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No. 81-113

SUPREME COURT OF THE UNITED STATES

Term, 1981

DEWEY SOWDERS, Superintendent, Kentucky State Reformatory - - - Petitioner

versus

EARL WAYNE WILEY - - - - Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONER WITH APPENDIX

STEVEN L. BESHEAR
Attorney General

MICHAEL R. BEITING
Assistant Attorney General

PAUL E. REILENDER, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4058

Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

The petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit rendered April 24, 1981.

QUESTIONS PRESENTED FOR REVIEW

Did the decision by the United States Court of Appeals for the Sixth Circuit, that respondent had exhausted his state remedies with respect to his ineffective assistance of counsel claim, circumvent an available state procedure in which respondent could have presented his ineffective assistance of counsel claim, thereby usurping the authority of the Kentucky state courts in this matter?

Does a trial counsel's concession of guilt during the closing argument, done as part of a legitimate trial strategy, deny the accused effective assistance of counsel within the meaning of the Sixth and Fourteenth Amendments of the United States Constitution where the client's consent does not appear of record?

Is a "Boykin" type inquiry constitutionally mandated when trial counsel concedes his client's guilt arguing for leniency in the closing argument?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption of the case before this Court.

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SUPREME COURT OF THE UNITED STATES

Term, 1981

No.

DEWEY SOWDERS, Superintendent,
Kentucky State Reformatory - - *Petitioner*

v.

EARL WAYNE WILEY - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER WITH APPENDIX

REFERENCE TO OPINIONS

Decision herein by the United States Court of Appeals for the Sixth Circuit was filed on April 24, 1981, and styled Earl Wayne Wiley v. Dewey Sowders, Superintendent, Kentucky State Reformatory, No. 80-3445. The decision reverses the judgment of the United States District Court for the Western District of Kentucky. The decision of the Sixth Circuit may be found at Appendix 31-47. The order and judgment of the United States District Court for the Western District of Kentucky, reviewed on an appeal to the Court of Appeals, dated March 31, 1980, may be found at Appendix 48-49. The magistrate's findings of fact, conclusions of law, and recommendations of March 3, 1980, which were accepted by the District Court order above set forth, may be found at Appendix 50-63. The memorandum opinion per curiam of the Kentucky Supreme Court rendered September 11, 1979, which

affirmed the respondent's trial court conviction may be found at Appendix 64-67.

STATEMENT OF JURISDICTION

The filing date of the decision of the United States Court of Appeals for the Sixth Circuit of which review is sought in this Court is April 24, 1981. The appellate decision resulted from a civil appeal from a habeas corpus proceeding in the District Court.

No rehearing was sought by any party.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate decision in question by 28 U.S.C. 1254(1).

This Court should grant the writ of certiorari under the authority of Rule 17.1(a) and (c) of this Court.

Rule 17.1(a). The Sixth Circuit has ruled that the respondent exhausted his state remedies with respect to his ineffective assistance of counsel claim by the mere presentation of this claim to the Kentucky Supreme Court, notwithstanding that the Kentucky Supreme Court never reached the merits of the claim because it had not been properly preserved for appellate review. In so doing, the Sixth Circuit has denied the Kentucky courts a first opportunity to rule on the question by way of its post-conviction relief procedure (Kentucky Rule of Criminal Procedure, hereinafter RCr 11.42), which is the prescribed way for an aggrieved defendant to raise constitutional questions of this type. The federal court of appeals has so departed from this Court's principles of comity and federalism

as to call for this Court's supervision to resolve the issue. Additionally, the Sixth Circuit has decided a federal question in a way in conflict with the Kentucky Supreme Court regarding the application of a "Boykin" inquiry to a closing argument where guilt is conceded as trial strategy in trying to obtain leniency for the client.

Rule 17.1(c). The Sixth Circuit has decided a nationally important question involving the scope and application of *Boykin* v. *Alabama*, 395 U. S. 238 (1969). As a corollary to that question, the Sixth Circuit has ruled that it is ineffective assistance of counsel to concede the client's guilt during closing argument while trying to obtain leniency for the client.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts there is no Constitutional authority to justify the results of the court below. Such absence of authority involves reference to

The Sixth Amendment, Constitution of the United States

The Fourteenth Amendment (Section 1), Constitution of the United States

28 U.S.C. 2254 (b)

28 U.S.C. 2254 (c)

RCr 11.42

RCr 9.84

The full text of this authority is set forth at Appendix 69-71.

STATEMENT OF THE CASE

References herein will be to either the Joint Appendix of the parties as filed in the Court of Appeals and which is presently not before this Court (JA), or to the Appendix which accompanies this petition (A). Respondent invoked federal jurisdiction under 28 U.S.C. 2254 in the District Court.

Earl Wayne Wiley, the respondent, was indicted by the Henderson County Grand Jury on August 1, 1978, along with his brother, Elmer Wiley, of first degree burglary, theft of the value of one hundred (100) dollars or more and being a persistent felony offender in the second degree. The offenses were committed on July 13, 1978 (JA 1-3).

On August 8, 1978, the respondent was arraigned and an attorney was appointed to represent him (JA 4-5). Separate counsel was also appointed for Elmer Wiley (Transcript of State Trial Record, hereinafter TR 6). Earl and Elmer both pled "not guilty" (JA 5; TR 7).

Earl and Elmer were jointly tried on September 20, 1978 (Transcript of State Trial Evidence, hereinafter TE 1). At the close of all the evidence in the first phase of the trial, the respondent's attorney presented the closing argument on behalf of both the respondent, and his brother Earl (JA 83). During the closing argument, the attorney admitted that both the respondent and Elmer were guilty (JA 87-88, 90-91, 93, 96-97). As was later explained in their amicus brief to the Kentucky Supreme Court, the trial counsel felt

that in light of the fact that the evidence against their clients was overwhelming, their only hope was to concede guilt and ask the jury to be lenient and merciful in rendering their verdict (JA 137-147). Both defendants were found guilty of first degree burglary and theft, and each was sentenced to ten (10) and fifteen (15) years, respectfully (JA 6-7).

During the persistent felony offender stage of the trial, Elmer's lawyer made the closing argument for both the respondent and Elmer. Again, guilt was admitted as part of the same trial strategy (JA 123-129). The jury found both the respondent and Elmer guilty as second degree persistent felony offenders and sentenced each to life imprisonment (JA 8). The judgment of the trial court was entered on October 2, 1978, sentencing the respondent to life imprisonment (JA 9-10).

The respondent, along with his brother, appealed to the Kentucky Supreme Court which affirmed their convictions on September 11, 1979 (A 64-67). Of importance to this petition are the issues raised on appeal to the Kentucky Supreme Court regarding the application of the "Boykin" inquiry to the closing argument, and the ineffective assistance of counsel claim. Principally, the respondent argued that he was denied effective assistance when his court-appointed lawyer repeatedly admitted his guilt to the jury without prior consent, and further, the trial court, *sua sponte,* should have conducted an on-the-record inquiry into whether or not the respondent and his brother voluntarily and intelligently consented to counsel's admissions. With respect to the

ineffective assistance of counsel claim, the Kentucky Supreme Court said the claim was not preserved for appellate review because it had never been presented to the trial court, hence they did not address it on appeal (A 66). Concerning the argument that the defense counsel's closing argument amounted to a guilty plea, the voluntariness of the plea, the Kentucky Supreme Court classified this as a "frivolous assignment of error" (A 66).

The respondent filed a petition for writ of habeas corpus and supporting memorandum in the United States District Court for the Western District of Kentucky on December 3, 1979 (JA 159-163). Again, of importance to this petition are the resolution by the District Court of the issues relating to whether a "Boykin" inquiry should have been held to determine the voluntariness and knowledge of the import of the plea, and whether the respondent was denied effective assistance of counsel. The District Court concluded (per magistrate King) that the contention, that a "Boykin" inquiry should take place where guilt is conceded during closing argument was "patently frivolous" (A 59). The District Court also concluded that the respondent was not denied effective assistance of counsel (A 59). The petition for writ of habeas corpus was denied on March 31, 1980 (A 49).

On April 25, 1980, the respondent filed his notice of appeal to the United States Court of Appeals for the Sixth Circuit (JA 184). Although the respondent raised basically the same issues raised earlier in the Kentucky Supreme Court and the United States Dis-

trict Court, the Court of Appeals decided the case on the ineffective assistance of counsel claim and did not consider the other claims raised (A 31-47). The Sixth Circuit found that the respondent had been denied effective assistance of counsel and reversed the decision of the District Court (A 47). This petition for writ of certiorari stems from the findings of the United States Court of Appeals for the Sixth Circuit that respondent had exhausted his state remedies and received ineffective assistance of counsel.

I.

ARGUMENTS AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Finding of Exhaustion of State Remedies by the Sixth Circuit and the District Court Was Incorrect and Denied the Kentucky Courts a First Opportunity to Rule on the Respondent's Ineffective Assistance of Counsel Claim.

The ramifications of the decision by the Sixth Circuit that the respondent had exhausted his state remedies, extend far beyond the instant case and effectively emasculate the Kentucky post-conviction relief procedure [RCr 11.42 (A 69-70)].

The petitioner submits that the respondent failed to exhaust his available state remedies with respect to the ineffective assistance of counsel claim, and, therefore, federal habeas corpus relief was inappropriate.

In its decision, the Sixth Circuit stated that the exhaustion of state remedies is satisfied and comity preserved when a federal constitutional claim is "fairly

presented" to the state court for initial determination (A 38). The Sixth Circuit seemed to ignore the fact that the merits of the claim were not considered by the Kentucky Supreme Court because it was not preserved before the trial, and hence, not properly preserved for appellate review. The decision of the District Court and the Sixth Circuit that state remedies were exhausted is clearly incorrect.

28 U.S.C. Sec. 2254 specifically requires that a petitioner seeking federal habeas corpus relief first exhaust any existing remedies in state court. An applicant is not deemed to have exhausted his state remedies if he has the right under state law to raise, by any available procedure, the question presented (A 68). In the case at bar it is uncontroverted that the merits of Wiley's claim of ineffective assistance of counsel may be asserted in the Kentucky courts by a motion to vacate sentence under RCr 11.42 (A 69-70). Wiley's failure to pursue his claim of ineffective assistance of counsel through available remedies in state court results in a failure to exhaust this claim, thereby rendering his present attack premature. Consequently, the issue of inadequate representation was not properly before the District Court or the Sixth Circuit.

The issue of ineffective assistance of counsel was raised on direct appeal in the Kentucky Supreme Court, but rejected without a consideration of the merits because it had not been properly preserved for appellate review by a prior presentation to the trial court (A 66). The petitioner submits that this was not

a "fair presentation" of the issue to the state courts as is required to exhaust an available state remedy. In *Picard* v. *Connor*, 404 U. S. 270, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971), the Supreme Court ruled that a petitioner had failed to exhaust his state remedies with respect to his constitutional claim even though he had asserted virtually the same challenge in the context of state law on direct appeal to the Massachusetts Supreme Judicial Court. The Court held that the petitioner's equal protection argument had never been fairly presented to the state court. Consequently, it required the petitioner to present his constitutional claim to the state courts before seeking federal habeas corpus relief.

This same rationale applies to foreclose review of respondent's claim of ineffective assistance of counsel. It cannot be said that the respondent's briefing of an unpreserved question gave the Kentucky courts a fair opportunity to resolve his constitutional claim. Kentucky has a strong and consistent policy of requiring strict compliance with its procedural rules. *Foremost Insurance Company* v. *Shephard*, Ky., 588 S. W. 2d 468 (1979); *Brown* v. *Commonwealth*, Ky., 551 S. W. 2d 557 (1977). In particular, the Kentucky courts routinely refuse to address the issue of trial counsel's effectiveness in the absence of a post-trial motion presenting the matter for the trial judge's consideration. *Wilson* v. *Commonwealth*, Ky., 601 S. W. 2d 280 (1980); *Hamilton* v. *Commonwealth*, Ky., 580 S. W. 2d 208 (1979); *Hennemeyer* v. *Commonwealth*, Ky., 580 S. W. 2d 211 (1979); *Smith* v. *Commonwealth*,

Ky., 567 S. W. 2d 304 (1978). Thus, respondent raised this issue on appeal with full knowledge that the matter would be disposed of on non-preservation grounds. This is borne out by counsel's failure to cite a single Kentucky case as authority for the review of the unpreserved issue in the Kentucky Supreme Court. Consequently, it is clear that when Wiley raised this issue on direct appeal of his conviction he did not afford the Kentucky Supreme Court a fair opportunity to resolve his constitutional claim.

The respondent's resort to federal habeas corpus as a vehicle for litigation of his ineffective assistance of counsel claim, and the acquiescence of the Sixth Circuit in such maneuvering, smacks of a deliberate by-pass of an available state remedy. The Sixth Circuit puts misplaced emphasis on the filing, in the Kentucky Supreme Court, of an amicus curiae brief by the respondent's trial counsel outlining and defending his trial strategy. The Sixth Circuit also considered important the fact that the trial judge submitted an affidavit to the Kentucky Supreme Court stating that in his opinion defense counsel were competent and their trial strategy was sound. The Sixth Circuit stated that with this additional information before it, the Kentucky Supreme Court had the position of all the parties concerned and was obligated to decide the ineffective assistance of counsel claim on the merits (A 40). The Sixth Circuit stated further that the trial judge's affidavit effectively foreclosed the respondent's relief through the RCr 11.42 procedure, and that exhaustion does not require pursuit of a futile

state remedy (A 40). The Sixth Circuit seemed to consider as unimportant the fact that (1) the Kentucky Supreme Court was not obligated to reach the merits on an issue not properly preserved for appellate review and (2) the respondent still had a state remedy available which was infinitely better suited to resolve the type of claim raised by the respondent.

In effect, the Sixth Circuit has ruled that state remedies are exhausted when an unpreserved trial claim, of a type ordinarily handled by way of the state's post-conviction relief procedure, is briefed on direct appeal to the state appellate court. This ruling has the practical effect of emasculating not just the Kentucky post-conviction relief procedure, but also any similar procedures in other states. As a result of the Sixth Circuit opinion, a defendant who briefs, and thereby "fairly presents," an unpreserved trial claim to the state appellate court is now able to proceed directly with that claim from the state appellate courts to the United States District Courts seeking federal habeas corpus relief. The state post-conviction relief procedure is therefore by-passed without ever having given the state courts an opportunity to rule on the defendant's constitutional claim. As a further consequence, this will inundate the already overburdened federal courts with claims that in the past have been presented first to the state courts for resolution by way of the state's post-conviction relief procedure. This results in an unnecessary expenditure of federal judicial energy and resources.

Although the Kentucky courts do not generally consider such claims on direct appeal because of the absence of a timely objection, and more importantly, because of the absence of an evidentiary hearing below in which the relevant facts can be developed, these claims are routinely considered by the Kentucky courts pursuant to motions to vacate under RCr 11.42 (A 69-70). *Hibbs* v. *Commonwealth,* Ky. App., 570 S. W. 2d 642 (1978); *Lay* v. *Commonwealth,* 506 S. W. 2d 507 (1974); *Ramsey* v. *Commonwealth,* Ky., 399 S. W. 2d 473 (1966), cert. denied, 385 U. S. 865 (1966). This is true even where the issue was not preserved for review at trial, nor raised on direct appeal. *Blankenship* v. *Commonwealth,* Ky. App., 554 S. W. 2d 898 (1977). In *Hibbs, supra,* the Court noted that the issue of the effective assistance of counsel is generally the subject of a RCr 11.42 motion, and not a direct appeal. It is only where a claim of ineffective assistance of counsel has been rejected on the merits on direct appeal that RCr 11.42 becomes an inappropriate vehicle for seeking relief. *Cleaver* v. *Commonwealth,* Ky., 569 S. W. 2d 166 (1978). Consequently, RCr 11.42 was an available and state remedy for the assertion of Wiley's constitutional claim, whereby evidence of the factual dispute over whether the respondent had consented to the strategy of conceding guilt in closing argument could be presented and resolved in an evidentiary hearing.

The petitioner has pointed out that respondent's briefing of the unpreserved claim under Kentucky law was the functional equivalent of a failure to present

his argument to the Commonwealth's highest court at all. Thus, Wiley failed to exhaust his state remedy. *Picard, supra; Williams* v. *Perini,* 557 F. 2d 1221 (6th Cir. 1977); *Watkins* v. *Estelle,* 527 F. 2d 1336 (5th Cir. 1976). Exhaustion of state remedies can require, as here, report to state statutes providing for post-conviction attacks on a judgment. *Keener* v. *Ridenour,* 594 F. 2d 581 (6th Cir. 1979); *Carothers* v. *Rhay,* 594 F. 2d 225 (9th Cir. 1979); *Miller* v. *Harvey,* 566 F. 2d 879 (4th Cir. 1977); *Dombrowski* v. *Johnson,* 488 F. 2d 68 (6th Cir. 1973). Consequently, the respondent's "by-pass" of an available procedure under Kentucky law for litigating his constitutional claim of ineffective assistance of counsel rendered his habeas corpus action premature.

The Seventh Circuit reached this same conclusion in *United States* v. *Israel,* 556 F. 2d 865 (7th Cir. 1977). There the petitioner sought relief on the ground (among others) that he was denied the effective assistance of counsel. The Court ruled that since the petitioner based his claim in part on matters not contained in the record that he had an available remedy under the Illinois post-conviction hearing act. Accordingly, it held that the petitioner had failed to exhaust his available state remedies. The Court also rejected the argument that resort to this process would be futile because of Illinois' less stringent standard for the effectiveness of counsel.[1]

[1]This was not a situation where it would have been futile to resort to an available state remedy, since state law did not preclude Wiley from obtaining relief on his ineffective assistance of counsel *(Footnote continued on next page)*

A similar result was reached in *Crowell* v. *Zahradnick*, 571 F. 2d 1257 (4th Cir. 1977). There the petitioner argued that he had exhausted his constitutional claim because he was procedurally barred from raising it on direct appeal under Virginia law. The Court rejected this position, finding that the petitioner could still raise this contention by attacking the inadequacy of his counsel in a state habeas corpus petition. Consequently, it ruled that the petitioner had failed to exhaust an available state remedy.

These cases provide convincing support for the petitioner's position that Wiley failed to exhaust an available state remedy with regard to his claim of ineffective assistance of counsel. Contrary to the opinion of the Sixth Circuit, the petitioner submits that Wiley's futile attempt to assert this claim for the first time on direct appeal in the Kentucky Supreme Court was not a "fair presentation" of his constitutional claim to the state's highest court.

The Sixth Circuit decision, that the exhaustion requirement was satisfied, was incorrect in another respect. The opinion of the Sixth Circuit regarding the claim of ineffective assistance of counsel attached great significance to the respondent's assertion below that he

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(Footnote continued from preceding page)
claim. Kentucky courts have reversed convictions on the basis of ineffective assistance of counsel in the past. *Flener* v. *Commonwealth*, Ky., 514 S. W. 2d 201 (1974); *Vaughan* v. *Commonwealth*, Ky., 505 S. W. 2d 768 (1974); *Raisor* v. *Commonwealth*, Ky., 278 S. W. 2d 635 (1955). The fact that the Sixth Circuit thought it was unlikely that Wiley would succeed on the merits of his claim in state court was a totally insufficient basis for the Sixth Circuit waive compliance with the exhaustion requirement.

did not consent to the concession of guilt in closing argument. However, there was absolutely no evidence of any kind in the record to support this contention. The petitioner submits that as a result of the significance attached to the consent issue by the Sixth Circuit, the resolution of the issue of respondent's consent to the closing argument became crucial in determining whether or not there was ineffective assistance of counsel. The need for an evidentiary hearing to resolve this issue was obvious. Instead, the Sixth Circuit, without any support for so doing, found that the respondent had not given his consent to the closing argument (A 45). At a minimum, the Sixth Circuit should have ordered the District Court to hold an evidentiary hearing on the matter. It has been held that where a petitioner makes factual contentions going outside the record, and a remedy is available in state court, that the petitioner has failed to exhaust his available state remedies. *Knoxson* v. *Estelle,* 574 F. 2d 1339 (5th Cir. 1978). There the Court ruled that new factual contentions in support of an alleged error should be reviewed by the state courts. This is only logical. The policy of federal-state comity embodied in the exhaustion doctrine is designed to give the state courts the first opportunity to hear and resolve constitutional claims. This policy is violated when a petitioner is permitted to by-pass an available state post-conviction remedy, which provides for evidentiary hearings, in order to seek a similar hearing on his claim in the federal courts. Consequently, the Sixth Circuit should have ruled that Wiley was precluded from seeking federal

habeas corpus relief on his claim of ineffective assistance of counsel.

Although the respondent's petition for writ of habeas corpus contained both exhausted and unexhausted claims, the Sixth Circuit did not dismiss the petition, but instead chose to base its entire opinion on the unexhausted claim of ineffective assistance of counsel. The petitioner submits that the better approach to follow where a petition contains both exhausted claims and one or more unexhausted claims is for the court to dismiss the entire petition, including the exhausted contentions. *Galtieri* v. *Wainwright*, 582 F. 2d 348 (5th Cir. 1978); *Gardner* v. *Blackburn*, 569 F. 2d 856 (5th Cir. 1978); *Gonzales* v. *Stone*, 546 F. 2d 807 (9th Cir. 1976). A rule allowing a federal court to consider the exhausted claims in a petition for writ of habeas corpus would almost certainly interfere with the state court's subsequent review of the petition's unexhausted claims. This would impair comity. *Gonzales, supra.* Such a rule would also lead to piecemeal litigation, thereby frustrating the judicial policy against fragmentary appeals, and creating unnecessary work for an already overburdened court. *Parr* v. *United States*, 351 U. S. 513, 76 S. Ct. 912, 100 L. Ed. 1377 (1956). Therefore, the petitioner submits that the respondent failed to exhaust his state remedies with respect to his ineffective assistance of counsel claim.

For the foregoing reasons, the petitioner respectfully requests this Honorable Court to grant the petition for writ of certiorari to rectify the misapplication and misinterpretation of the doctrine of exhaustion of

state remedies to the case at bar, and to undue the destructive effect of the Sixth Circuit's opinion on Kentucky's post-conviction relief procedure.

II.

THE SIXTH CIRCUIT'S DECISION THAT THE RESPONDENT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL CONFLICTS WITH THE DECISION OF OTHER COURTS.

The Sixth Circuit incorrectly found that the respondent was denied effective assistance of counsel when his attorney conceded his guilt during the closing argument. The Sixth Circuit in reaching its decision seemed to dismiss without consideration that this concession was done as part of a legitimate trial strategy to obtain leniency for the respondent.

The Sixth Circuit found, without any support in the record for so doing, that the respondent had not consented to the concession of guilt in closing argument. Because of this alleged lack of consent, the respondent was allegedly denied effective assistance of counsel. As stated earlier, the Sixth Circuit has made the respondent's consent the pivotal factor in determining whether or not there was ineffective assistance of counsel. As such there needed to be some evidence in the record before the court could make such a finding. In the case at bar, there was absolutely no evidence whatsoever. Thus, the need for an evidentiary hearing was obvious in order to gather evidence on the matter.

In effect, the Sixth Circuit has established a per se rule of ineffective assistance of counsel: It is ineffective assistance of counsel when an attorney adopts a trial strategy, such as conceding guilt in closing argument in order to obtain leniency, without first getting his client's approval on the record. Needless to say, such a rule takes control of the case away from the attorney. An attorney should certainly be able to pursue a trial strategy the client may not understand. It is clear that it is within the discretion of defense counsel to select trial tactics which he believes will best advance his client's interests. As Justice Harlan stated in his concurrence in *Brookhart* v. *Janis,* 314 U. S. 1, 8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966):

> "I believe that a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval."

In this same vein, it has been stated that:

> "If counsel is to have the responsibility for conducting a contested criminal trial, quite obviously he must have the authority to make important tactical decisions promptly as a trial progresses. The very reasons why counsel's participation is of such critical importance in assuring a fair trial for the defendant, see *Powell* v. *Alabama,* 287 U. S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158, make it inappropriate to require that his tactical decisions always be personally approved, or even thoroughly understood, by his client. Unquestionably, assuming the lawyer's competence, the client must accept the consequences of his trial strategy. A rule

> which would require the client's participation in every decision to object, or not to object, to proffered evidence would make a shambles of orderly procedure. *United States ex rel. Allum* v. *Twomey*, 484 F. 2d 740, 744-745 (CA 7 1973)."

Justice Stevens has likewise repudiated the notion that an accused must give prior approval of counsel's trial tactics:

> "The notion that a client must always consent to a tactical decision not to assert a constitutional objection to a proffer of evidence has always seemed unrealistic to me. *Wainwright* v. *Sykes*, 433 U. S. 72, 94-95, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) concurring opinion."

Clearly then, trial counsel was not required to obtain the respondent's prior approval before adopting the complained-of trial tactic in his closing argument.

The ripple effect of such a rule, requiring on-the-record consent to strategic trial matters, will have tremendous repercussions in the state and federal courts. The criminal defendant's consent will have to appear in the record on such matters of strategy as the strategic failure to object when appropriate, the type of questions to be asked of witnesses, the decision on whether or not to call a certain witness, the decision on whether or not to introduce evidence, etc. The practical effect of such a rule will be to lengthen the trial time of a case in the already crowded state and federal trial courts.

The Sixth Circuit's ineffective assistance of counsel rule will also open the floodgates to the appellate courts

with ineffective assistance of counsel claims. In a case where a defendant's consent does not appear on the record, the defendant can choose to be bound or not bound depending on the outcome of the case. This will greatly increase the number of such claims raised in the state courts. More importantly, the federal courts, in light of the Sixth Circuit's handling of the exhaustion issue, will be confronted with the increased number of such claims in the form of petitions for writ of habeas corpus.

As mentioned before, trial counsel conceded the brothers' guilt in his closing argument at trial before arguing mitigating factors on the theft-related offenses (JA 86-97). The Magistrate's Report, later adopted by Judge Johnstone, found that this was a competently conceived and applied trial strategy which did not deny the respondent effective assistance of counsel (A 63). The Sixth Circuit paid little attention to petitioner's argument that this was a competent trial tactic, especially under Kentucky procedure where the jury determines guilt or innocence and also fixes the penalty. [RCr 9.84(1) (A 71)].

It must be recognized that respondent's counsel had very little to go on in the case. His client was stopped by the police within minutes of the theft with the stolen goods in his possession (JA 49-53, 62). The stolen goods were found in the same Budget Rent-A-Truck seen leaving the Tegethoff home only a few minutes earlier (JA 28). Burglar tools and a pistol were found in the front seat of the van (JA 65, 68). Earl Wiley fled the scene (JA 52).

Neither co-defendant took the stand on his own behalf, nor did they offer any explanation for their conduct. The possibility of a successful defense in this situation was simply non-existent. In light of this telling case against his client, defense counsel took what he felt to be the most reasonable course; that is, to argue for lienency for his client (JA 139-140).

It should be noted that trial counsel vehemently disputed the Public Advocate's assessment of his representation in a highly unusual amicus brief filed with the Kentucky Supreme Court (JA 137-147). Trial counsel argued that they saw no hope of avoiding conviction for the principal offenses, but hoped to minimize the punishment received. They were successful in achieving the latter objective, since Earl Wiley and his co-defendant received the minimum sentence permitted by Kentucky law for burglary (JA 6; KRS 511.020; 532.060). Also, defense counsel's avowed strategy in the persistent felony offender (PFO) stage of the proceeding was to win acquittal or minimum punishment (JA 139-141). Although the trial counsel was not successful at the PFO stage (the respondent received the maximum sentence—life imprisonment), this does not mean that the trial tactic was ill-conceived.

The strategy of conceding guilt finds support in Kentucky law. In *Meadows* v. *Commonwealth*, Ky., 550 S. W. 2d 511 (1977), the Court held that an appeal to the jury's mercy accompanied by a concession of guilt was a permissible trial tactic. Furthermore, the Kentucky courts have long noted that a jury is free to disregard evidence of prior felonies in a habitual of-

fender trial. As the Court stated in *Coleman* v. *Commonwealth,* Ky., 276 Ky. 802, 125 S. W. 2d 728, 729 (1939):

> ". . . Perhaps they deemed the principal crime for which the accused was being tried not to merit such severe punishment or that the character of the man itself did not justify it."

Thus, by invoking the sympathy of the jury, defense counsel hoped to obtain a minimal punishment for his client. His lack of success in this attempt may have disappointed his client, but it did not amount to ineffective assistance of counsel.

The District Court's review of the record indicated that counsel did not abdicate his professional duty to zealously represent the interests if his client. The court stated defense counsel conducted a vigorous defense of his client throughout the proceedings (JA 175-176). The court noted that counsel moved for a directed verdict of acquittal on two occasions. He also requested instructions on second and third degree burglary, which were denied by the court (JA 82). He argued vigorously that several mitigating factors were present which reduced the gravity of the appellant's offense (JA 91-98). He continually objected to the procedure followed by the Commonwealth during the persistent offender stage of the proceedings (JA 107, 116, 119, 121-122). Finally, the presiding judge, by affidavit submitted on appeal, stated his opinion that both defense attorneys were competent members of the local bar, and had performed as such in the case *sub*

judice (JA 146-147). It is the petitioner's contention that defense counsel employed a permissible trial tactic in making his closing argument to the jury. Petitioner submits that his decision to do so was well within his discretion in conducting Wiley's defense.

The Sixth Circuit's finding of ineffective assistance of counsel is the result of misapplication of its own case of *Beasley* v. *United States,* 491 F. 2d 687 (6th Cir. 1974) and other decisions relating to ineffective assistance of counsel. The United States Supreme Court has long interpreted the Sixth Amendment right to "the Assistance of Counsel" to mean "effective" assistance of counsel. *Powell* v. *Alabama,* 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932). The Court has also stated that advice given by counsel must be "within the range of competence demanded of an attorney in criminal cases." *McMann* v. *Richardson,* 397 U. S. 759, 771, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970). See also *Tollett* v. *Henderson,* 411 U. S. 258, 36 L. Ed. 2d 235, 93 S. Ct. 1602 (1973). However, this Court has not articulated a constitutional test which has an application broader than a "guilty plea" situation. Thus, the defining of the proper standard for judging the effectiveness of trial counsel has been left primarily to the lower federal courts and the state courts. *McQueen* v. *Swenson,* 498 F. 2d 207 (8th Cir. 1974).

Many courts have adopted the standard of counsel "reasonably likely to render and rendering reasonably effective assistance," including the federal courts in the 6th Circuit. *Beasley* v. *United States,* 491 F. 2d 687 (6th Cir. 1974); *Herring* v. *Estelle,* 491 F. 2d 125

(5th Cir. 1974); *Williams* v. *Twomey*, 510 F. 2d 634 (7th Cir. 1975). Although the Beasley court stated expressly that it was rejecting the "farce and mockery" standard, petitioner submits that the distinction between the two standards is more apparent than real. It is perhaps more informative to state that an accused is denied the effective assistance of counsel, when his attorney's incompetence deprives him of a substantial defense. *Beasley, supra,* at 696. Error free representation is not required. *Parker* v. *North Carolina*, 397 U. S. 790, 25 L. Ed. 2d 785, 90 S. Ct. 1458 (1970).

In *Beasley,* the Court stated at 696 that:

> "If however, action that appears erroneous from hindsight was taken for reasons that would appear sound to a competent criminal attorney, the assistance of counsel has not been constitutionally defective. *McMann* v. *Richardson*, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)."

The petitioner submits that this same rationale supports rejection of respondent's claim in this case. Courts have been particularly reluctant to second-guess the strategy or trial tactics of defense counsel in effectiveness of counsel cases. *Moran* v. *Hogan*, 494 F. 2d 1220 (1st Cir. 1974); *Walker* v. *Henderson*, 492 F. 2d 1311 (2d Cir. 1974), cert. denied 417 U. S. 972 (1974); *Haggard* v. *Alabama*, 550 F. 2d 1019 (5th Cir. 1977); and *United States* v. *Cotton*, 446 F. 2d 865 (8th Cir. 1971). As the 8th Circuit has noted "a wrong or poorly advised decision by a defense attorney is not alone enough to support a subsequent claim of ineffec-

tive counsel." *United States* v. *Hager*, 505 F. 2d 737 (8th Cir. 1974).

Although the opinion of the Sixth Circuit espouses these same principles, the Sixth Circuit did judge the effectiveness of counsel from hindsight. Further, the Court did second guess counsel's judgment and trial strategy. It completely ignored and discounted the representation rendered at all other phases of the trial. It based its finding of ineffectiveness totally on the content of the closing argument. The total circumstances surrounding the case must be reviewed before deciding on the effectiveness of counsel by the attorney. *Vaughan* v. *Commonwealth*, Ky., 505 S. W. 2d 768 (1974). Trial tactics are often hard decisions made in the tempo of the adversary proceeding and, once made, are not subject to rejection in the event one misfires. *Johnson* v. *United States*, 506 F. 2d 640, 643 (8th Cir. 1974) cert. denied 420 U. S. 978 (1974). Yet, this is precisely what the Sixth Circuit has done in the case at bar. The Sixth Circuit has rejected the trial strategy because it was not successful. Trial counsel's judgment in the case may be subject to debate, but it does not amount to ineffective assistance of counsel. *United States* v. *Yelardy*, 567 F. 2d 863 (6th Cir. 1978), cert. den. 99 S. Ct. 133 (1979).

For the foregoing reasons, this Court should review this error because of the grave implications it carries and the flood of claims to the federal and state courts that will likely ensue as a result.

III.

THE CONCESSION OF GUILT IN THE CLOSING WAS NOT A *DE FACTO* GUILTY PLEA AND THEREFORE THE SIXTH CIRCUIT WAS INCORRECT IN DECIDING THAT A "BOYKIN" TYPE INQUIRY WAS CONSTITUTIONAL.

The Sixth Circuit stated in its opinion that the concession of guilt in the closing argument amounted to a guilty plea and as such the trial court was obligated to make an on the record inquiry of the defendant to ensure the plea was voluntary and intelligent.

The petitioner submits that the concession of guilt in the closing argument was not a guilty plea and the Sixth Circuit incorrectly extended *Boykin* v. *Alabama,* 395 U. S. 238 (1969), to the closing argument phase of the trial. Contrary to the opinion of the Sixth Circuit, the respondent was not denied the right to have his guilt or innocence decided by the jury. Further he was extended those constitutional rights fundamental to a fair trial.

The respondent herein, presented the same arguments to the Kentucky Supreme Court and the United States District Court. It is interesting to note that the Kentucky Supreme Court and District Court respectively characterized the argument as "a frivolous assignment of error" and "patently frivolous" (A 59, 66).

It was clear to the courts below, with the exception of the Sixth Circuit, that *Boykin supra,* and its progeny deal only with the situation where an accused, prior

to trial, makes the decision to plead guilty to the charges against him. In those circumstances, this Court requires that the judge inquire as to whether the defendant understands the nature and consequences of his plea, the constitutional rights that he is relinquishing, and whether or not the plea is voluntary, *Boykin, supra.*

This Court has also noted that the decision to plead guilty involves the making of difficult judgments. The accused and his counsel must assess the weight of the prosecution's case without having the opportunity to test that case. *Brady* v. *U. S.*, 397 U. S. 742 (1970); *McMann* v. *Richardson,* 397 U. S. 759 (1970). The accused relinquishes his right to a trial by jury, his privilege against self-incrimination, and the right to confront his accusers.

The foregoing discussion makes it abundantly clear that there is absolutely no analogy between a concession of guilt in closing argument and a guilty plea. In the case at bar, the respondent certainly had the opportunity to confront his accusers and to test the strength of the prosecution's case. In fact, it was seeing the overwhelming evidence against his client that mandated the trial counsel's strategy (JA 139). Secondly, the accused was not denied his right to a jury trial. The jury returned a verdict of guilty and imposed the minimum sentence permitted by law in the first phase of the trial. The prosecution had sought the maximum penalty. Finally, the respondent did not waive his privilege against self-incrimination. In *Boykin,*

supra, at 242, footnote 4, the Court approved the statement that even a voluntary confession by the defendant in open court did not amount to a guilty plea. Surely, then, an admission by counsel in closing argument cannot be said to be the equivalent of a guilty plea. The petitioner submits that this rebuts the Sixth Circuit's decision that a concession of guilt by counsel in closing argument is the "functional equivalent" of a guilty plea, and requires a *Boykin* inquiry.

CONCLUSION

For the foregoing reasons the petitioner respectfully requests this Honorable Court to grant the petition for writ of certiorari in this case in order to rectify the misinterpretation and misapplication of the exhaustion requirement of 28 U.S.C. 2254, and *Boykin* v. *Alabama, supra,* to the case at bar.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

MICHAEL R. BEITING
Assistant Attorney General

PAUL E. REILENDER, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4058

Counsel for Petitioner

PROOF OF SERVICE

I, Michael R. Beiting, one of counsel for the petitioner, hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed postage prepaid this 17th day of July, 1981, to Hon. Kevin Michael McNally, Assistant Public Advocate, State Office Building Annex, Third Floor, Frankfort, Kentucky 40601, Counsel for Earl Wayne Wiley.

Michael R. Beiting

MICHAEL R. BEITING
Assistant Attorney General
Counsel of Record for Petitioner

APPENDIX

No. 80-3445

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EARL WAYNE WILEY, - - - *Petitioner-Appellant,*

v.

DEWEY SOWDERS, Superintendent, Kentucky State Reformatory, - - *Respondent-Appellee.*

Appeal from the United States District Court for the Western District of Kentucky, Paducah.

OPINION—Decided and Filed April 24, 1981.

Before: WEICK and ENGEL, Circuit Judges; and HILLMAN,* District Judge.

HILLMAN, District Judge. Earl Wiley, petitioner, was indicted by the Henderson County Grand Jury on August 1, 1978, along with his brother, Elmer Wiley, of first degree burglary,[1] theft of the value of $100 or more[2] and being a persistent felony offender in the second degree.[3] The offenses were allegedly committed on July 13, 1978.

On August 8, 1978, Earl Wiley was arraigned and counsel appointed to represent him. Earl Wiley pled "not guilty." Separate counsel was appointed for Elmer Wiley. Elmer Wiley also pled "not guilty."

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*Honorable Douglas W. Hillman, United States District Judge for the Western District of Michigan, sitting by designation.

[1]KRS § 511.020.

[2]KRS § 514.030.

[3]KRS § 532.080(2).

The Wileys were tried together on September 20, 1978. The jury found both Earl Wiley and Elmer Wiley guilty of first degree burglary and theft, and sentenced each to 10 and 5 years respectively.[4] At the persistent felony phase of the trial held that evening, the same jury found the Wileys guilty and the first degree burglary charge was enhanced to life imprisonment. Judgment was entered October 2, 1978, sentencing Earl Wiley to life.

The Wileys appealed to the Supreme Court of Kentucky which affirmed their convictions on September 11, 1979. In this habeas corpus petition, Earl Wiley challenges both the conviction and the habitual criminal sentence. The district court denied his petition. We reverse.

In challenging his convictions, Wiley raises several constitutional challenges. Principally, he argues that because his court-appointed lawyer repeatedly admitted his guilt to the jury without his prior consent, he was denied effective counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Our disposition of this issue makes it unnecessary to consider his other constitutional claims.

At the close of proofs in the first phase of trial, petitioner's counsel presented the closing argument on behalf of both defendants.[5]

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[4]Under Kentucky procedure, the jury, in addition to determining the guilt or innocence of a defendant, also fixes the penalty. Kentucky Criminal Rule 9.84(1). Thereafter, the court imposes sentence. Criminal Rule 11.02.

[5]The practice of one attorney making a closing argument on behalf of two defendants, whose interests could well be in conflict, might well in and of itself constitute reversible error. "Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness." *Glasser* v. *United States*, 315 U.S. 60, 75 (1942).

Defense counsel's closing argument, apparently a "trial tactic," contained several unequivocal admissions that the defendants were guilty while at the same time attempting to obtain mercy. The following are excerpts from defense counsel's closing argument:

> "Ladies and gentlemen, I think it's very important that you realize what the function of [counsel for Elmer Wiley] and mine is in the case. *We were appointed to represent these two men,*[6] and we are going to represent them to the best of our ability, and that is what I want to talk to you about right now. (emphasis added.)

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[6]Although not raised as error, this statement constitutes highly questionable practice. Compare with the conduct of Harold R. Medina, eminent trial attorney and later Circuit Judge on the U. S. Court of Appeals for the Second Circuit. Medina was court-appointed counsel for Anthony Cramer, an alleged German saboteur, charged with treason during World War II. Feeling ran high against Medina and, among other indignities, he was spat on by a spectator. At the close of the government's case, the trial judge asked Medina to stand and then proceeded to praise him highly for his skill and vigor in defending Cramer as assigned counsel without compensation. In response, Medina immediately took exception to the court's remarks as he had not wanted the jury to think that he personally thought Cramer was guilty and was defending him only because he had been assigned by the court to do it. Medina said:

> "May it please your Honor, I have a most distressing and disagreeable task, and that is to object to the fact that you have mentioned that to this jury, and to take exception o your Honor's comment. It is something I do with the most extreme regret, but I honestly feel that my duty requires that I do it. I do not think the jury should have been told that. I have tried to keep it from them myself, and I have not mentioned it." *The Anatomy of Freedom*, Harold R. Medina, Henry Holt and Company, 1959, p. 59.

"Often times when a lawyer gets involved in a case, he gets stars in his eyes and he starts having notions that there may be some way, you know, if I examine this case . . . and I do my homework and I go out and I investigate as much as I can and I interview all the witnesses, that I'll be able to get a man off. That I will be able to prove to a jury that he is not guilty with what they have got him charged with.

"The stars aren't in our eyes in this case, ladies and gentlemen. They never have been. We're all adults. We're all mature thinking human beings . . .

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"But as I said, the stars aren't in my eyes in this case. . . . Because unfortunately for these two men that you see here today, *they are guilty. They're guilty as charged* by the Commonwealth's Attorney's office. (Emphasis added.)

"Mr. Walker [the prosecutor] in voir diring you all said, do you understand that the indictment . . . doesn't become a question of fact until I prove beyond a reasonable doubt that they are in fact guilty.

"We have to stand and give him credit for that because, ladies and gentlemen of the jury, *he has proved to you beyond a reasonable doubt that these gentlemen are guilty of this crime.* We don't have stars in our eyes, and we never have. *They're guilty.* (Emphasis added.)

• • • • • • • •

"I couldn't stand up here and argue to you on behalf of Earl Wiley — you know there were no eye witnesses, and I could make the same argument about Elmer Wiley — you know there were no eye witnesses, nobody saw them go in and come out. I'm not that foolish. I'm not that naive. And I know you're not.

"I know, and you know, you're going to give these men time in the penitentiary. And they know it, or they had better know it after they've heard the evidence here today. They're going to the penitentiary. That part's easy *because they're guilty.* I can't stand up here and say they didn't do it, they haven't proven that they did it, I'd be foolish and naive and immature. *Because they did do it.* And the Commonwealth's Attorney's office has proven to you that they have done it. (Emphasis added.)

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"I told you before we know they are going to the penitentiary. And they know that they're going to the penitentiary. And you know they're going to the penitentiary.

• • • • • • • •

". . . It's bad, and it's a crime, and you know and I know and they know they are going to the penitentiary . . .

• • • • • • • •

"Ladies and gentlemen, we submit to you that in this case, in this case, that we are here about today the *question of guilt is absolutely clear. Absolutely clear, beyond a question of a doubt.* You know sometimes we stand up and we argue beyond a reasonable doubt. We don't have that argument here today. We don't have that argument here today. I don't think there is reasonable doubt. I don't think there is a shadow of a doubt that these two men are guilty. (Emphasis added.)

"*We ask that you be a compassionate jury and a merciful jury* within reason because we know good and well as I stand here today that you're going to find these

> boys guilty. I know you are going to find them guilty. There is no question in my mind about it. There is no question in your mind about it . . . I'd venture to say that there's not a single one of you sitting here who is not going to say that these boys are guilty. I know that. It's going to happen. We know that it is going to happen." (Emphasis added.)

At the close of the proofs of the second phase of trial, counselor for petitioner's brother made the closing argument for both defendants. Again, the predominant theme of this closing argument was that both men were guilty of the burglary and theft with the added admission that both men had prior convictions. The specific strategy is unclear, particularly when counsel told the jury he was not asking for mercy. Following is an excerpt from the closing argument:

> "Your first verdict reflects what [attorney for Earl Wiley] forthrightly told you before you went out to deliberate on it that these men did that. That they definitely did do it. He also told you in first summation here that these men had been, his quote was 'down the road before' . . .
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> • • •
>
> "Elmer and Earl Wiley have been here before. Each of these men has been previously adjudged guilty of going where they had no right to be, and taking what did not belong to them. That's in the record here.
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> • • •
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> "Earl in 1974. Elmer in 1972. Both in McCracken Circuit Court down in Paducah. In the most literary sense of the term, ladies and gentlemen, when that happened in '74 and '72 to him both of these men incurred a debt to society . . .

"Elmer Wiley's first debt in '74—excuse me, in '72, and Earl's first one in '74, that that means that you must assess an ultimate toll here today that is far far heavier than anything that you have done before.

• • •

"I submit that you folks had a very very strong suggestion, a very very strong indication before you were sent out the first time garnered from [counsel's] statement that these guys had been down the road before. Well there it is. They have. They have been down the road before and they are still on the same road . . .

• • •

"[Attorney for Earl Wiley] told you if you will recall in the first summation before you ever went out that first time that these men were guilty. That those men were guilty . . .

• • •

"*We don't ask you folks for mercy here.* I feel there's little enough of that in the world anyway and what there is isn't to be applied in a case like this. These men are guilty. They are guilty of a serious crime. We haven't tried to duck that. We haven't tried to pull any wool over your eyes on that." (Emphasis added.)

EXHAUSTION OF STATE REMEDIES

Before addressing petitioner's claim of ineffective counsel, a threshold question must be considered. Respondent contends that petitioner has failed to exhaust available state remedies with respect to the ineffective counsel claim and therefore federal habeas relief is inappropriate.

It is, of course, well recognized that a state convicted prisoner must first exhaust his available and adequate state remedies as a condition precedent to federal habeas relief.

28 U.S.C. § 2254(b). *See, Preiser* v. *Rodriguez,* 411 U. S. 475 (1973), The exhaustion doctrine springs from considerations of comity between the states and federal government. *Fay* v. *Noia,* 372 U. S. 391 (1963). The required exhaustion is "designed to give the state an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Wilwording* v. *Swenson,* 404 U. S. 249, 250 (1971).

Exhaustion is satisfied and comity preserved when a federal constitutional claim which arises in a state criminal proceeding is "fairly presented" to the state court for initial determination. *Picard* v. *Connor,* 404 U. S. 270, 275 (1971).

Under the law of Kentucky, claims of ineffective counsel are initially addressed to the trial court through a post-trial motion under Kentucky Rule of Criminal Procedure 11.42. Petitioner made no such motion. Instead his ineffective counsel claim was first presented on direct appeal to the Kentucky Supreme Court. Nevertheless, the Kentucky Supreme Court has, on occasion, reviewed unpreserved error to prevent "manifest injustice." *Stone* v. *Commonwealth,* Ky., 456 S. W. 2d 43 (1970). In the past, the state appellate court has both agreed and refused to consider the issue of ineffective assistance of counsel on direct appeal. *Wilson* v. *Commonwealth,* Ky., 601 S. W. 2d 280 (1980); *Nickell* v. *Commonwealth,* Ky., 565 S. W. 2d 145 (1978).

In the present case, the Kentucky Supreme Court received the parties' briefs which contained arguments on the ineffective counsel issue. In addition, the Kentucky Supreme Court took the unusual step of gathering supplemental material relative to this claim. For example, petitioner's trial counsel was permitted to file an amicus brief outlining and defending his trial strategy. In addition, the presiding trial judge submitted an affidavit stating that in his

opinion defense counsel were competent and their trial strategy sound. After having received these materials, the state supreme court nevertheless backed off the issue by declining to rule on the ineffective counsel claim stating that absent a post-trial motion, the claim was not preserved for appellate review. Nevertheless, it is clear that the Kentucky Supreme Court, by virtue of its own orders, had before it the position of all parties concerned: Petitioner, the Commonwealth, both trial counsel, and the trial judge. Unquestionably the issue of trial counsel's ineffectiveness was "fairly" presented. Relevant in this regard is the case of *Rachel* v. *Bordenkircher*, 590 F. 2d 200 (6th Cir. 1978). In *Rachel*, the constitutional claim which formed the basis of the habeas petition was not preserved at the trial court. Nevertheless, the petitioner urged the Kentucky Supreme Court to consider the claim on the theory that the unpreserved error resulted in "manifest injustice." The Kentucky Supreme Court did not directly address the issue but rejected the claim as either "(1) without merit or (2) not properly preserved for review." Rachel then filed a petition for a writ of habeas corpus. The Attorney General, as he does here, argued that Rachel was required to return to Kentucky and file a state post-conviction motion before the trial judge. This Court stated:

> "We disagree. As already noted, the Kentucky appellate court has already had a fair opportunity to review this issue and to require petitioner to trek through Kentucky's post-conviction relief procedure again is simply to further delay redress of a clear infraction of his constitutional rights . . . Furthermore, requiring petitioner to apply for relief again in the Kentucky courts might be an exercise in futility. [Citations and footnotes omitted.]" *Id.*, at 204

Consistent with *Rachel*, we conclude that although petitioner's claim was not preserved before the trial court the

claim was fairly presented to the state supreme court. Our opinion that petitioner's claim was fairly presented to the appellate court is further reinforced by the unusual manner in which the claim came before that court. Having submitted an affidavit to the state supreme court, the trial judge effectively foreclosed petitioner's further relief through the conventional post-trial motion. Petitioner's remedy at the trial court level was prejudiced and any further pursuit rendered futile. The exhaustion doctrine does not require pursuit of a state remedy where such a pursuit is clearly futile. *Coley* v. *Alvis*, 381 F. 2d 870 (6th Cir. 1967); *Galtieri* v. *Wainright*, 582 F. 2d 348 (5th Cir. 1978).

Conversely, the fact that the appellate court received this expanded record placed that court in substantially the same position as if the post-trial motion had been made, denied, and incorporated into the appellate record. After receiving the affidavit which foreclosed petitioner's trial court remedies, the appellate court was obligated to decide the ineffective counsel claim on the merits. Petitioner cannot be penalized because the Kentucky Supreme Court refused to decide an issue put squarely before it. Likewise, it is settled that satisfaction of the exhaustion requirement "cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely presented in petitioner's brief in state court." *Smith* v. *Digmon*, 434 U. S. 332, 333 (1978).

Accordingly, we conclude that petitioner has exhausted his state remedies with respect to his ineffective counsel claim and that his claim is appropriately before this court.

EFFECTIVENESS OF COUNSEL

Since *Powell* v. *Alabama*, 287 U. S. 45 (1932), the Sixth Amendment of the United States Constitution has been construed to require that a criminal defendant be afforded

effective assistance of counsel.[7] As the Supreme Court noted in *McMann* v. *Richardson*, 397 U. S. 759 (1970), counsel's performance must be "within the range of competence demanded of attorneys in criminal cases." *Id.*, at 771.

In his opinion in *Beasley* v. *United States*, 491 F. 2d 687 (6th Cir. 1974) Judge Celebrezze chronicled the history of the law of ineffective counsel within this circuit. The opinion recounts the early "see-saw between a 'reasonably effective assistance of counsel' standard [*United States* v. *Johnson*, 318 F. 2d 288 (6th Cir. 1963)] and a 'farce and mockery' test [*O'Malley* v. *United States*, 285 F. 2d 733 (6th Cir. 1961)]." *Beasley, supra*, at 695. *Beasley* resolved this fluctuation by adopting a standard more probing and more objective than the farce and mockery standard. *Beasley* held the Sixth Amendment to require that "[d]efense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations." *Id.*, at 696.

The *Beasley* standard of effective counsel incorporates several well-settled principles of law. The requirement that counsel be effective is not a result-oriented standard. Counsel is required to be competent, but not necessarily victorious. The measure of competence is that of the ordinary practitioner in the heat of trial. Counsel's effective assistance is not to be judged from hindsight. *Id.*, at 696. Error-free representation is not required. *Parker* v. *North Carolina*, 397 U. S. 790 (1970).

Any claim alleging counsel's ineffective trial performance requires the court to mediate between the funda-

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[7]The Sixth Amendment of the United States Constitution guarantees that "[in] all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

mental due process rights of the accused and the need of defense counsel to structure his case. It is not the purpose of this court to second-guess counsel's judgment and trial strategy. As Justice Harlan asserted in his concurring opinion in this case of *Brookhart* v. *Janis*, 384 U. S. 1, 8 (1966):

> ". . . A lawyer may properly make the tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval."

The welfare of the client, our adversarial system and orderly judicial procedure require that an attorney chart his course of litigation free from undue intervention. It is axiomatic that no two lawyers would ever try the same case in exactly the same manner. The court is particularly sensitive to counsel's need to freely structure his own argument on his client's behalf.

Notwithstanding the strong policy favoring attorney autonomy, ethical, professional and constitutional principles establish limits to counsel's control over a criminal case. Canon 7 (EC 7-24) of the Code of Professional Responsibility of the American Bar Association provides:

> "The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact."

The decision to plead "guilty" or "not guilty" is a decision reserved solely for the accused based on his intelligent and voluntary choice. *Boykin* v. *Alabama*, 395 U. S. 238 (1969). The defendant's decision to plead guilty cannot be presumed from the plea itself in the context of an otherwise silent record. Instead, the trial court must make an

on the record inquiry of the defendant to insure that the defendant's plea is voluntary and intelligent. *Id.*, at 243-244. Similarly, an attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of "not guilty" unless the defendant unequivocally understands the consequences of the admission. *Brookhart* v. *Janis, supra.* Counsel may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof. However, an attorney may not stipulate to facts which amount to the "functional equivalent" of a guilty plea. *United States* v. *Brown,* 428 F. 2d 1100 (D.C. Cir. 1970); *Cox* v. *Hutto,* 589 F. 2d 394 (8th Cir. 1979); *Achtien* v. *Dowd,* 117 F. 2d 989 (7th Cir. 1941).

Appellee relies on *Meadows* v. *Commonwealth,* Ky., 550 S. W. 2d 511 (1977), for the proposition that in Kentucky an appeal to the jury's mercy accompanied by a concession of guilt is a permissible trial tactic. That is not a correct reading of *Meadows.* Meadows' counsel, in closing argument, said, "I think he deserves punishment." The Court held this did *not* constitute a plea of guilty, but instead was a "ploy." The Court went on to say:

> "The action of trial counsel in this particular instance may have amounted to a tactical retreat but certainly it did not surrender the cause." *Id.*, at 512.

Here, however, the admissions of Wiley's counsel constituted a surrender of the sword.

In *People* v. *Carter,* 41 Ill. App. 3d 425, 354 N. E. 2d 482 (1976), the Appellate Court of Illinois analyzed a factual and legal situation similar to the case at bar. In *Carter,* the defendant was charged with armed robbery. The victim testified that after the defendant lost his money in a dice game, he pulled a gun and stated that this was a stickup. The defendant took the stand and denied robbing the victim or taking a gun to the apartment. Defense counsel,

during closing argument, not only stated that his client was not very brilliant in doing what he did, but specifically declined to discuss the factual discrepancy concerning whether the defendant was armed. Reversing the defendant's conviction on the grounds the defendant was denied effective assistance of counsel by defense counsel's closing argument, the court stated:

> "In the instant case, we believe defendant was denied the effective assistance of counsel. Counsel's closing argument is the most notable incident that leads us to this conclusion. A defendant's closing argument permits an answer to the State on the law and the facts and a presentation of the defense theory . . . *Here, counsel's closing argument not only failed to perform this function, but was tantamount to an admission of his client's guilt.* . . . Counsel abdicated his client's position. . . . Such failures cannot be overlooked as mere errors in judgment or trial startegy." (Citation omitted, emphasis added.) *Id.*, at 485.

Also, in *Commonwealth* v. *Lane*, 382 A. 2d 460 (1978), the Supreme Court of Pennsylvania analyzed a similar situation. The defendant was charged with knowingly receiving stolen property. During closing argument, defense counsel said this to the court, "If he didn't have a record I would ask Your Honor to give him the benefit of the doubt and find him not guilty." Reversing the defendant's conviction because he was denied effective assistance of counsel, the court stated:

> "It is urged counsel was engaged in a strategic trial tactic to obtain leniency for his client. We are not so persuaded. At the particular moment, Lane was challenging his guilt and the issue confronting the court was guilt or innocence. We are unable to see how trial

counsel's statement would aid Lane's claim of innocence." *Id.*, at 461.

Throughout the closing arguments, both attorneys for petitioner repeatedly stated to the jury that petitioner was "guilty," "guilty as charged," and "guilty beyond reasonable doubt." Counsel's argument represented the precise admission which the defendant rejected in making his earlier plea of "not guilty." Counsel made his remarks with knowledge of petitioner's earlier "not guilty" plea, and without petitioner's consent.[8]

A plea of "not guilty" has at least two dimensions recognizable by this court. First, in pleading "not guilty" a defendant reserves in toto those constitutional rights fundamental to a fair trial. Included in this category of constitutional rights is the accused's right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. *Boykin, supra.* Second, in pleading "not guilty," a defendant exercises his right to make a

---

[8]Petitioner first raised before the Kentucky Supreme Court his assertion that he did not consent to counsel's concession of guilt by his response to the amicus brief submitted by his trial counsel. No claim was ever made by trial counsel in their amicus brief to the Kentucky Supreme Court that their trial strategy was made known or consented to by petitioner. Petitioner reaffirmed his non-consent in his sworn petition for habeas corpus. Respondent did not dispute this issue. The United States Magistrate, in his finding of fact number 11, summarized the facts surrounding trial counsel's confession of guilt without mentioning that petitioner did not consent to this confession. The Magistrate's conclusion of law number 3 noted that no facts were in dispute. Petitioner objected to these findings insofar as they did not reflect his lack of consent to counsel's trial tactic. Petitioner's statement that he did not consent to counsel's trial tactic is not controverted. In any event, an alleged consent in the present case cannot be presumed from a silent trial record. Consent obtained without the protection of an on the record inquiry as required by *Boykin, supra,* is a nullity.

statement in open court that he intends to hold the government to strict proof beyond a reasonable doubt as to the offense charged. *Byrd* v. *United States*, 342 F. 2d 939 (D.C. Cir. 1965).

Unquestionably, the constitutional right of a criminal defendant to plead "not guilty," or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea. We, therefore, hold that petitioner was deprived of effective assistance of counsel when his own lawyer admitted his client's guilt, without first obtaining his client's consent to this strategy. In those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with *Boykin, supra.*

Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue.

Finally, the question remains open whether an adjudication of ineffective assistance requires a showing that defense counsel's performance adversely affected the trial's outcome and, if such a showing is required, on whom the burden of proving or disproving prejudice falls. *Chapman* v. *California*, 386 U. S. 18 (1967); *United States* v. *Yelardy*, 567 F. 2d 863 (6th Cir. 1978), *cert. denied*, 439 U. S. 842 (1978); and *United States* v. *Beasley, supra.* Under the facts of this case, however, no such claim could seriously be raised. Despite strong circumstantial evidence against

petitioner, no witness observed the burglary. No one saw a gun in the hand of either defendant. Yet use of a "deadly weapon" is one of the essential elements under Kentucky law of first degree burglary. Who can be sure that both or either of these brothers would have been convicted had not the jury been told by defendant's own attorney "they're guilty"?

A criminal defendant has a constitutional right to expect during trial that his attorney will, at all times, support him, never desert him, and will perform with reasonable competence and diligence. Defense counsel in this case fell short of this modest standard.

Accordingly, the judgment of the district court is reversed and the case is remanded to the district court with instructions to grant petitioner's release unless the state initiates procedures to retry him within a reasonable period of time.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY AT PADUCAH

No. 79-0230-P(J)

EARL WAYNE WILEY - - - - - - *Petitioner*

v.

DEWEY SOWDERS - - - - - - *Respondent*

ORDER AND JUDGMENT—Entered March 31, 1980

This matter being before the Court on a petition for writ of habeas corpus filed by the petitioner pursuant to 28 USC §2254; this matter having been referred to the U. S. Magistrate and the Magistrate having filed his report pursuant to 28 USC §636 and the petitioner having filed timely objections thereto; the Court having made a *de novo* determination of those portions of the Magistrate's report to which the petitioner has objected; there appearing to be no affirmative allegations in the pleadings before this Court or in the trial court record that the petitioner did or did not consent or have prior knowledge of the content of his counsel's closing argument addressed to the jury; the Court having determined that it should modify in part the findings of fact of the Magistrate's report and should otherwise accept the Magistrate's report; and the Court being sufficiently advised;

It is hereby ORDERED that:

1. The report of the Magistrate is accepted by the Court and is incorporated by reference herein. In addition to the findings of fact of the Magistrate's report which are

made a part of this judgment, the following factual finding is made, to-wit: "The petitioner's penalty was enhanced to a life prison sentence by the jury following his conviction as a persistent felony offender."

2. The petition for writ of habeas corpus be DENIED.

Dated: March 31, 1980

(s) Edward H. Johnstone
U. S. District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY AT PADUCAH

No. 79-0230-P(J)

EARL WAYNE WILEY - - - - - - *Petitioner*

v.

DEWEY SOWDERS - - - - - - *Respondent*

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS—Entered March 3, 1980

This matter coming before the court on proceeding filed pursuant to 28 USC §2254; upon a conviction and judgment exacted by the Henderson Circuit Court on the 2nd of October, 1978; it appearing that the petitioner was granted leave to proceed in forma pauperis and his petition was filed on the 3rd of December, 1979; it appearing that the respondent filed his Answer with all exhibits required by Rule 5 of the Rules Governing Section 2254 Proceedings; the Court having referred this matter to the undersigned Magistrate pursuant to 28 USC §636(b) and Rule 8 of the above-mentioned Rules; the undersigned having considered the record as a whole, makes the following proposed findings and recommendations to the Court:

FINDINGS OF FACT

1. On the 13th of July, 1978, at approximately 1:00 to 1:15 p.m., the petitioner, using the name Earl W. Riley, entered the Budget Rent-a-Truck Agency operated by Mrs. Margaret Rumans. Mrs. Rumans rented the petitioner a cargo van (truck no. CV 701, license no. 74494 A). The

petitioner was identified by the witness as the man who rented the truck (TR 74-87).

2. On the 13th of July, 1978, at approximately 2:15 p.m., Kenneth Tegethoff, son of Edward Tegethoff, was traveling to his parents' home on the Geneva-Alzey Road in Henderson County, Kentucky. As he was driving on the one-lane driveway from the Geneva-Alzey Road to his parents' house; a white truck, which had previously been parked behind the house, approached the witness, passed him, and proceeded out the driveway. The truck, being driven by two white males, had the words Budget Rent-a-Truck painted on the side and was similar to the truck referred to in Finding 1 above and depicted in photographs admitted as exhibits. The witness entered his parents' home and, after noticing several items out of place, saw that his mother's sewing machine was missing. He then called the sheriff's department. Upon the sheriff's arrival; the witness, Kenneth Tegethoff, gave information concerning the missing items.

The next day, the witness saw a truck similar to the truck that had passed him in his parents' driveway at a Henderson service station. Upon inspection, he found property which he could identify as belonging to his parents in the back of the truck (TR 88-110).

3. The property taken from the Tegethoff home had a fair market value of in excess of $100.00 (TR 117, 124-125).

4. On the 13th of July, 1978, Officer Robert Williams along with Officer Young, set up a road block in order to try to intercept the white van involved in the burglary. At approximately 2:45 p.m., the witness, Williams, stopped a van answering the description and identified the petitioner as the driver of the van. The petitioner fled the area on foot. At the trial, the witness identified the petitioner as the driver of the van and as the man who fled on foot (TR 126-132).

5. Shortly after the petitioner fled the scene; Bobby Sauls, Sheriff of Webster County, arrived at the scene where the van had been stopped. After taking the petitioner's co-defendant into custody from Officer Williams, Sheriff Sauls obtained a description of the stolen articles from the Henderson County Sheriff's Office. He then looked in the window of the van and saw "that most of these articles were there" (TR 138-144). Upon inspecting a pillow slip found between the two bucket seats in the van, Sheriff Sauls found, among other things, a loaded .22 caliber pistol (TR 144, 147).

6. Sheriff Sauls testified as follows:

> "And at that time I went back and asked Mr. Wiley (petitioner's co-defendant and brother) where he had gotten the articles and who was with him in the van. And he told me that it was his brother that was with him and he was helping him move.
>
> Mr. Norment: Objection, Your Honor.
>
> The Court: Overruled.
>
> Mr. Norment: May we approach the bench please?
>
> The Court: You may.
>
> (At this point, counsel for the parties and the reporter approached the bench and the following record was made, in low tones.)
>
> Mr. Norment: Judge, any testimony about what one co-defendant says about another is inadmissible."
>
> . . .
>
> "The Court: . . . Do you want me to admonish the jury not to consider the last response.
>
> Mr. Norment: Yes, on behalf of Earl Wiley also,
>
> (The following proceedings were had in normal tones.)
>
> The Court: All right, members of the jury, Sheriff Sauls just testified as to what one of the defendants

said concerning his co-defendant. That answer that the sheriff just gave, you're to remove that from your mind and not to consider it in arriving at a verdict in this case."

(TR 141-143)

7. Sheriff Sauls received a citation from Officer Williams which had been found at the scene of the arrest. The Indiana traffiic citation named Earl Wayne Wiley as the recipient of the citation with an operator's number of W 400 162 866 587 (TR 157-159). This operator's license number is the same as given by the petitioner when he rented the truck (Plaintiff's Exhibit 5).

8. At the close of evidence by the Commonwealth, the petitioner's attorney moved for a directed verdict of acquittal on the grounds that the Commonwealth had failed to establish a prima facie case of burglary in the first degree against the petitioner. The motion was overruled (TR 173-174).

9. On query of the court, petitioner's counsel indicated that he did not wish to make an opening statement or present any evidence for the defense. The counsel for the co-defendant likewise announced closed. The court then advised the jury in pertinent part as follows:

"The Court: All right, members of the jury, all of the evidence is in in this case and it will be necessary for me to take up some matters in chambers and get the instructions ready for you. It's now more important than ever that you do not discuss the case or let anybody discuss it with you. You are to refrain from forming or expressing an opinion thereon. We might be in the neighborhood of 15 minutes hopefully getting these ready for you."

(TR 174-175)

10. Upon recess to chambers, petitioner's counsel renewed his motion for directed verdict of acquittal. The motion was overruled. Counsel also unsucessfully sought an instruction on circumstantial evidence (TR 175-180).

11. Mr. Norment, petitioner's counsel, presented the closing argument on behalf of both defendants. In his presentation, he stated on more than one occasion that the petitioner and his co-defendant were guilty as charged. He further asked the jury to consider the totality of the circumstances surrounding the offense, to be "merciful," and to arive at a minimal sentence (TR 187-198).

12. The jury found the petitioner guilty under Instructions Nos. 1 and 2 and assessed a penalty of ten years and five years respectively (TR 183, 184, 209).

13. On the 2nd of October, 1978, the petitioner's counsel, on petitioner's behalf, filed a Notice of Appeal (Clerk's Transcript of Record p. 61).

14. All issues raised herein by the petitioner were presented to the Supreme Court of Kentucky on appeal (See Appellant's brief).

15. By Memorandum Opinion Per Curiam rendered the 11th of September, 1979, the Supreme Court of Kentucky affirmed the conviction of the petitioner (Memorandum of Law in Support of Petition for Writ of Habeas Corpus A 140-143).

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action pursuant to 28 USC §2241 *et seq.* §2254.

2. The petitioner has exhausted his state remedies by appearing all issues raised in this action to the Supreme Court of Kentucky. *Deitch* v. *Maxwell*, 337 F. 2d 424 (C.A. 6 1964).

3. There being no facts in dispute as raised by the petition, no evidentiary hearing is required. *Townsend* v. *Sam*, 372 U. S. 293.

4. The petitioner's conviction was not obtained in violation of his right to be confronted with the witness against him as guaranteed by the 6th and 14th Amendments to the United States Constitution.

Authority

The testimony, subsequent objection, and ruling of the court objected to and giving rise to this issue may be found in Finding of Fact 6 above.

The witness testified that the petitioner's codefendant and brother told him (the witness) that the petitioner had been in the van and was moving with the codefendant's help. Petitioner's counsel objected, the objection was sustained, and the jury was admonished not to consider the statement in arriving at a verdict in the case.

The petitioner cites *Bruton* v. *United States*, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1966), in support of his position. In that case, the Supreme Court held that admission of codefendant's confession that implicated defendant at joint trial constituted prejudicial error even though the trial court admonished the jury not to consider the statement as to the defendant. This case is clearly distinguishable from the case at bar in that the statement by petitioner codefendant was not a confession of any criminal act and did not allege that the petitioner had committed any criminal act or acts. As this distinction can be made, further language from the *Bruton* opinion becomes particularly relevant to the testimony and resulting admonition of which the petitioner complains. At 77 S. Ct. 2d 300 the court stated:

> "Unless we proceed on the basis that the jury will follow the court's instructions where those instructions

> are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little senes." 352 U. S., at 242, 77 S. St., at 300. We agree that there are many circumstances in which this reliance is justified. Not every admission of inadmissible heresay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. "A defendant is entitled to a fair trial but not a perfect one."

The Supreme Court more recently discussed its *Bruton* reasoning in *Parker* v. *Randolph*, ____ U. S. ____, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979). The Court, in discussing the harmlessness of the error, stated at 99 S. Ct. at 2138:

> In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission so insignificant by comparison, that it is clear beyond a reasonable doubt that introduction of the admission at trial was harmless error.

If the Magistrate, for argument's sake, were to accept the position that the petitioner's codefendant's statement made to Sheriff Sauls constituted a confession under *Bruton;* we feel that the implication of the petitioner arising from the statement is so "insignificant by comparison" to the "properly admitted evidence of guilt" as set forth in the record and the Findings of Fact above constitutes harmless error.

We conclude that the statement of petitioner's codefendant was not a confession and was not admitted into evidence. Therefore, the petitioner's Sixth Amendment rights were not deprived by its making.

5. The burglary statute under which the petitioner was convicted is not unconstitutional for vagueness.

Authority

KRS 511.020, the statute attacked and under which the petitioner was convicted on September 20, 1978, states, in pertinent part as follows:

> *Burglary in the first degree.* — (1) a person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully:
>
> (a) In a dwelling;
>
> (b) In a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
>
> 1. Is armed with explosives or a deadly weapon;
>
> . . .

The term "dwelling" and "building" are defined by KRS 511.010 as:

> (1) "Building," in addition to its ordinary meaning, means any structure, vehicle, watercraft or aircraft:
>
> (a) Where any person lives; or
>
> (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation.
>
> Each unit of a building consisting of two (2) or more units separately secured or occupied is a separate building.
>
> (2) "Dwelling"means a building which is usually occupied by a person lodging therein.

The petitioner bases his argument on the assertion that the definitions of "building" and "dwelling" are synonomous and therefore the petitioner could not have reasonably been expected to know whether his actions constituted

burglary in the first degree or burglary in the second degree. It is not necessary for the Magistrate to determine whether these terms are indistinguishably synonomous.

The petitioner is apparently basing his argument under prior law and not under the law that was in effect on the date of the offense and as cited above. The petitioner's lack of knowledge of the provisions of this statute has given rise to this issue. According to the statute in effect on July 13, 1978; burglary in the first degree could be effected by the unlawful entering of a "dwelling" or the entering of a "building" and being in possession (either personally or by a codefendant) of a deadly weapon. We are sure that the petitioner will not deny that a pistol is a "deadly weapon" as defined by KRS 500.080(4)(a). The jury found the petitioner guilty under instruction number 1. See Finding of Fact 12 above. Under that instruction, the jury not only found that the Tegethoff home was a "dwelling" but found that the petitioner or another participant had in his possession during the immediate flight a pistol. See Finding of Fact 5 herein. Therefore, it is of no consequence whether the edifice where the Tegethoffs lived should be defined, or understood by the petitioner, to be a "dwelling" or "building" under KRS 511.010. The facts as found by the jury in instruction 1 would support a conviction of burglary in the first degree as defined by KRS 511.020 as amended.

Notwithstanding the above analysis of the specific provisions of the Kentucky Revised Statutes complained of by the petitioner, the Magistrate rejects the contention that Chapter 511 as amended effective June 17, 1978, is unconstitutionally vague as defined by the United States Supreme Court in *McBoyle* v. *United States*, 283 U. S. 25, 51 S. Ct. 340, 75 L. Ed. 816 (1931).

6. The statements made by petitioner's counsel in his closing argument did not constitute a guilty plea so as to

require an inquisition by the Court into the voluntariness and knowledge of the import of the plea.

Authority

This allegation is patently frivolous and only a short discussion will be made.

The United States Supreme Court stated in *Boykin* v. *Alabama,* 395 U. S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969);

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.

Obviously, if the petitioner's counsel's statements had constituted a guilty plea; the evidence would have never gone to the jury. It was the jury who determined the petitioner's guilt and judgment was imposed pursuant to those verdicts and not upon some imagined plea of guilty submitted by counsel on behalf of a petitioner during the course of a trial. This argument is without merit.

7. Petitioner received effective assistance of counsel at his trial as required by the Constitution of the United States.

Authority

In assessing the merit, or the lack of merit, of the petitioner's assertion that his trial counsel failed to provide adequate assistance of counsel at trial on the specific grounds that counsel, in his argument before the jury, stated that the petitioner was guilty; the Magistrate read the complete trial transcript made a part of the record herein. The Magistrate concludes that, considering the totality of circumstances, the assistance of counsel furnished the petitioner was effective. The Sixth Circuit

Court of Appeals in *United States* v. *Yelardy*, 567 F. 2d 863 (1978) discussed its approach in assessing the merits of such a Sixth Amendment claim. At page 865, the Court stated:

> . . . our evaluation of appellant's Sixth Amendment claim turns "not on a mere assessment of particular missteps or omissions by counsel, whether or not caused by negligence . . . but on the District Court's evaluation of the total picture, with the objective of determining whether petitioner was deprived of rudimentary legal assistance," . . .

There is no question that upon review of the trial transcript and the specific findings of fact in this report, the weight of evidence against the petitioner was overwhelming. A further undisputed fact revealed by the record is that petitioner's counsel vigorously represented the interests of his client both prior to, during, and after trial.

The record reveals that counsel filed several pretrial motions on petitioner's behalf soon after his appointment. During the trial, counsel conscientiously objected to the introduction of damaging evidence, both documentary and testimentary, against the petitioner. Counsel moved for directed verdicts of acquittal on behalf of his client both at the close of the Commonwealth's case-in-chief and at the close of the evidence in the case. Petitioner's counsel filed a Notice on Appeal on behalf of the petitioner. See Finding of Fact 13 above.

During counsel's closing argument to the jury, he stated that petitioner was guilty and beseeched the jury to assess a minimal sentence. See Finding of Fact 11. Defense counsel, in his amicus brief addressed to the Supreme Court of Kentucky (Petitioner's Appendix 106-114), asserted that his statement to the jury was a part of his trial strategy. He stated that his plan of strategy was adopted

after having considered the overwhelming weight of evidence against his client. The petitioner does not challenge counsel's intent or good faith in adopting his strategy.

The United States Court of Appeals for the Sixth Circuit examined this issue and formulated the proper guidelines to be used in its determination in *Beasley* v. *United States*, 491 F. 2d 687 (C.A. 6, 1974). Effective assistance of counsel was defined as "counsel reasonably likely to render and rendering reasonably effective assistance." With this general definition in mind, we now must apply this test to the sole area of ineffective assistance raised by the petitioner, i.e., application of counsel's trial strategy. The Sixth Circuit Court stated in *Beasley* at 696:

> Defense strategy and tactics which lawyers of ordinary training and skill in the criminal law would not consider competent deny a criminal defendant the effective assistance of counsel, if some other action would have better protected the defendant and was reasonably forseeable as such before trial. *United States* v. *Katz*, 425 F. 2d 928, 930 (C.A. 2, 1970). If, however, action that appears erroneous from hindsight was taken for reasons that would appear sound to a competent criminal attorney, the assistance of counsel has not been constitutionally defective. *McMann* v. *Richardson*, 397 U. S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

The Supreme Court of Kentucky considered a case similar to the case at bar styled *Meadows* v. *Commonwealth*, 550 S. W. 2d 511 (Ky. 1977). In this case, the appellant had been convicted of capital murder. In his closing argument, appellant's trial counsel made the following statement:

> "So, if you would think about the evidence when you get back into the jury room and apply it to the law

> which the Judge will give you and arrive at a fair and impartial judgment and give Ronnie Meadows, I think he deserves punishment, but give him what you think he deserves."

Appellate counsel argued that such a statement denied appellant effective assistance of counsel. The court, in an opinion written by Justice Palmore, addressed this argument at pages 512 and 513 with language which eloquently expresses the opinion of the Magistrate:

> This last point leads into another contention that has become all too common in the appeals being presented by the Public Defender, which is that because trial counsel did or did not do this, that or the other which he should or should not have done, according to the hindsight judgment of appellate counsel, the defendant was deprived of his Sixth Amendment right of counsel and, indeed, of his due process right to a fair trial. It is easy for brilliant young lawyers to flyspeck a trial record and pick out flaws in the manner in which it was practiced. It is even more simple if one has had no first-hand experience of his own in the pit. We have read the transcript of this trial and are not at all convinced that it was incompetently tried or that any of the alleged errors and irregularities, singly or in toto, resulted in an unfair trial. This was a mean, desperate case. In our opinion it is beyond any reasonable doubt whatever that even if it were practiced, and every trial action taken, as appellate counsel would have it, any impartial jury in the country would find Meadows guilty of murder just as this jury in McCracken County did. The outcome was just plainly inevitable, . . .

The Magistrate sees it as very unfortunate that, given the set of circumstances in the case at bar, the petitioner

found it necessary to assail the ethical standards of his trial counsel. Since petitioner did not rely on the ethics related allegations in significant proportions, further discussion of this matter is not necessary.

In conclusion; the Magistrate, after having considered the record as a whole, finds that the strategy adopted by trial counsel was competently conceived and applied and that, therefore, the petitioner was afforded effective assistance of counsel at trial as required by the Sixth and Fourteenth Amendments of the United States Constitution.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law; the Magistrate recommends that the petition for writ of habeas corpus herein be denied.

(s) W. David King
United States Magistrate

CERTIFICATE

Pursuant to Title 28, U.S. Code, Section 636, Rule 8 of the Rules Governing Section 2254 Procedures, and Rule 6.05 of the Federal Rules of Civil Procedure; the parties shall have thirteen days from the date hereof to file written objections to the foregoing report with the Clerk of the Court. An extra copy of same shall be mailed to the undersigned at P.O. Box 826, Paducah, Kentucky.
Dated: 3-03-80

(s) W. David King
United States Magistrate

RENDERED: SEPTEMBER 11, 1979

SUPREME COURT OF KENTUCKY

78 SC 626 MR
78 SC 627 MR

ELMER LEE WILEY and
EARL WAYNE WILEY - - - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Henderson Circuit Court
Honorable Carl B. Melton, Judge
Indictment No. 78 CR 049

MEMORANDUM OPINION PER CURIAM—AFFIRMING

Appellants are brothers who were convicted of first-degree burglary (10 years), theft (5 years), and of being persistent felony offenders in the second degree. They appeal from a judgment sentencing them to life imprisonment.

On July 13, 1978, appellants rented a van from Budget-Rent-a-Truck. A short time later the van was seen departing from the Tegethoff house, whose owners were known to be away. It was discovered that the house had been burglarized, so the police were alerted. A half hour later, in neighboring Webster County, officers stopped appellants in the van. Earl, the driver, fled, leaving Elmer to explain the presence of numerous stolen goods, burglar's tools, and a loaded .22 caliber pistol in the van. At trial, neither brother offered any defense.

Several issues were raised by both appellants and can be readily disposed of. 1) They contend KRS 511.020 and KRS 511.030 are unconstitutionally vague, in that the broad definition of "building" [KRS 511.010 (1)(a)] would seem to encompass "dwelling," which traditionally has been one distinguishing element between first and second degree burglary. Appellants are correct that after amendment of KRS 511.020 by Chapter 125, Acts of 1978, first degree burglary may be committed in a building not a "dwelling." However, they overlook the fact that KRS 511.020 as amended requires that one of several aggravating factors be present *if* the building is not a "dwelling." *See* Palmore, *Kentucky Instructions to Juries*, Comment Sec. 3.01, p. 14 (1979 Supp). We find no vagueness in these statutes.

2) Appellants seek to raise for the first time on appeal the sufficiency of the indictment, which omitted the phrase "with intent to commit a crime" on the burglary count. Though this issue has not been properly preserved for review, we remind appellate counsel that the indictment did specify KRS 511.020 and otherwise comport with Official Form 15 which is appended to the Kentucky Rules of Criminal Procedure. Those forms are deemed sufficient as a matter of law. RCr 13.06.

3) Appellants contend the trial court erred in giving a complicity instruction too broad for these facts. But no objection was made by either defense counsel, so the error will not be reviewed. RCr 9.54 (2).

4) During the persistent felon phase of trial, the deputy clerk testified and read into evidence five previous judgments of conviction for storehouse or dwelling house breaking, three for Earl and two for Elmer. Contrary to appellants assertion, this was not unnecessary repetition and detail, but was the proper procedure to follow. The jury was informed in a straightforward fashion of

facts relevant to its determination of the appropriate penalty for these recidivist offenders.

5) Appellants contend they were denied effective assistance of counsel when defense counsel in closing chose to concede that appellants had been proven guilty and to argue instead for leniency, citing such facts as no endangerment to human life. This claim has never been presented to the trial court, hence we will not address it on appeal. *Davidson* v. *Commonwealth*, Ky., 555 S. W. 2d 269, 272 (1977).

6) A connected argument is that defense counsel's closing argument amounted to a de facto guilty plea, necessitating an immediate hearing to determine the voluntariness and competency of appellants' pleas. This is a frivolous assignment of error.

7) Appellants also attack the instructions given on the persistent felony offender charges, but failed to record any objections at the proper time. RCr 9.54(2).

Individually, Elmer asserts he was entitled to a directed verdict of acquittal simply because he was not driving the van and did not flee as Earl did. Suffice it to say there was sufficient evidence to submit the case to the jury. *Trowel* v. *Commonwealth*, Ky., 550 S. W. 2d 530, 533 (1978).

Earl raises two separate questions. First, he criticizes the instruction on first-degree burglary on the ground there was no proof of entry with the pistol. Not only was this error not preserved by timely objection, but KRS 511.020 was amended effective June 17, 1978, so as no longer to require the element of armed intrusion if a dwelling is involved. Second, Earl claims denial of confrontation by the admission of Elmer's prior statement to the police that he was helping his brother move. Elmer did not take the stand, it is true, but this is a far cry from *Bruton* v. *United States*, 391 U. S. 123 (1966). Elmer had not made a confession of guilt implicating Earl; the judge

admonished the jury not to consider the statement. We do not hesitate to declare this error harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. *Harrington* v. *California*, 395 U. S. 250 (1969).

The judgments are affirmed.

All concur.

Attorneys for Appellants:

JACK EMORY FARLEY, Public Advocate
RODNEY McDANIEL, Assistant Public Advocate
State Office Building Annex, Third Floor
Frankfort, Kentucky 40601

Attorneys For Appellee:

ROBERT F. STEPHENS, Attorney General
MICHAEL R. BEITING, Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

THE CONSTITUTION OF THE UNITED STATES
Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

* * * * * * *

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2254. State custody; remedies in State courts

* * * * * * *

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * * * * * *

RULE 11.42 Motion To Vacate, Set Aside Or Correct Sentence

(1) A prisoner in custody under sentence who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court which imposed the sentence to vacate, set aside or correct it.

(2) The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

(3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

(4) The clerk of the court shall notify the attorney general and the commonwealth's attorney in writing that such motion (whether it be styled a motion, petition or otherwise) has been filed, and the commonwealth shall have 20 days after the date of mailing of notice by the clerk to the attorney general in which to serve an answer on the movant.

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and is financially unable to employ counsel, shall appoint counsel to represent him in the proceeding, including appeal.

(6) At the conclusion of the hearing or hearings the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him a new trial, or correct the sentence as may be appropriate.

(7) Either the movant or the Commonwealth may appeal from the final order or judgment of the trial court in a proceeding brought under this Rule.

Amended effective July 1, 1976.

(8) The final order of the trial court on the motion shall not be effective until expiration of time for notice of appeal under RCr 12.04 and shall remain suspended until final dispossition of an appeal duly taken and perfected.

Amended effective November 1, 1978.

(9) Counsel appointed for the movant under this rule shall be entitled to reimbursement by the commonwealth for his reasonable expenses of travel and subsistence for necessary conferences with the movant at his place of confinement, provided that each trip made for that purpose be authorized in advance thereof by order of the trial court.

(10) Original applications for relief of the nature described in this rule that are addressed directly to a court other than the one in which the sentence was imposed shall be transmitted to the court in which the sentence was imposed for further disposition in the manner above set forth.

Amended effective January 1, 1965; January 1, 1970; September 1, 1970; July 1, 1976.

* * * * * * *

RULE 9.84 Penalty

(1) When the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty, except where the penalty is fixed by law, in which case it shall be fixed by the court.

(2) When the defendant enters a plea of guilty, the court may fix the penalty, except in cases involving offenses punishable by death.

* * * * * * *

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NO. 81-113

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DEWEY SOWDERS, SUPERINTENDENT,
KENTUCKY STATE REFORMATORY,
PETITIONER,

v.

EARL WAYNE WILEY,
RESPONDENT,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEVIN MICHAEL McNALLY
Assistant Public Advocate
State Office Building Annex
Third Floor
Frankfort, Kentucky 40601
(502) 564-5255

Counsel for Respondent

C. THOMAS HECTUS
Attorney at Law
Gittleman, Charney & Barber
Marion E. Taylor Bldg.
Suite 800
Louisville, Kentucky 40202
(502) 585-2101

Of Counsel

October 5, 1981

QUESTIONS PRESENTED

I.

WAS THE UNITED STATES COURT OF APPEALS CORRECT IN HOLDING THAT WILEY HAD EXHAUSTED HIS STATE REMEDIES AS TO THE ISSUE OF WHETHER HE RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE ISSUE WAS RAISED ON APPEAL BEFORE THE KENTUCKY SUPREME COURT AND THE COURT TOOK THE UNUSUAL STEP OF PERMITTING A BRIEF FILED BY TRIAL COUNSEL EXPLAINING THEIR "STRATEGY" ACCOMPANYING AN AFFIDAVIT FROM THE TRIAL JUDGE STATING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AS WELL AS SUPPLEMENTAL BRIEFING ON THIS ISSUE BY THE APPELLANTS, WHERE KENTUCKY EMPLOYS A SIGNIFICANTLY DIFFERENT STANDARD TO JUDGE THE ISSUE OF THE EFFECTIVENESS OF COUNSEL THAN DOES THE SIXTH CIRCUIT AND WHERE KENTUCKY FAILED TO PROPERLY PRESENT THE ISSUE OF EXHAUSTION TO THE UNITED STATES DISTRICT COURT?

II.

DID TRIAL COUNSEL'S ADMISSION OF GUILT ON WILEY'S BEHALF DURING THE CLOSING ARGUMENT OF THE "SUBSTANTIVE" PHASE OF WILEY'S TRIAL AND A CODEFENDANT'S LAWYER'S ADMISSION OF GUILT ON WILEY'S BEHALF DURING THE "ENHANCEMENT" PHASE OF WILEY'S TRIAL DENY WILEY HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW WHERE: 1) WILEY WAS CONTESTING HIS GUILT AND DID NOT CONSENT (ON THE RECORD OR OTHERWISE) TO HIS LAWYER'S ADMISSION OF GUILT ON WILEY'S BEHALF; 2) WILEY DID NOT CONSENT (ON THE RECORD OR OTHERWISE) TO A CODEFENDANT'S LAWYER'S CLOSING ARGUMENT ADMITTING GUILT ON WILEY'S BEHALF; 3) NO COMPETENT TRIAL STRATEGY COULD JUSTIFY COUNSEL'S ACTIONS IN ADMITTING WILEY'S GUILT UNDER THE CIRCUMSTANCES OF THIS CASE; AND 4) ONE OF THE ATTORNEYS ADMITTED DURING ARGUMENT THAT THEY WEREN'T ASKING FOR MERCY?

III.

WAS WILEY DENIED HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST INCRIMINATION AND TO CONFRONTATION, TRIAL BY JURY, AND DUE PROCESS OF LAW WHEN HIS LAWYER AND A CODEFENDANT'S LAWYER ADMITTED GUILT ON WILEY'S BEHALF DURING CLOSING ARGUMENT OF BOTH PORTIONS OF WILEY'S TRIAL, BUT WILEY'S CONSENT TO THESE ADMISSIONS OF GUILT ON HIS BEHALF DOES NOT APPEAR ANYWHERE IN THE RECORD?

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Respondent, Earl Wayne Wiley, respectfully prays that a Writ of Certiorari not issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered on April 24, 1981.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in pertinent part:

> No person shall...be compelled in any criminal case to be a witness against himself...

The Sixth Amendment to the United States Constitution, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a...trial, by an impartial jury...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution, Section One, in pertinent part:

> ...nor shall any State deprive any person of...liberty...without due process of law...

COUNTERSTATEMENT OF THE CASE

A.

PROCEDURAL HISTORY

Earl Wayne Wiley, respondent, was indicted by the Henderson County Grand Jury on August 1, 1978 [Indictment No. 78-CR-049] along with his brother, Elmer Lee Wiley, for first degree burglary, theft of the value of $100.00 or more and being a persistent felony offender in the second degree. The offenses were allegedly committed on July 13, 1978 [Joint Appendix in Sixth Circuit , hereinafter A, 1-3].

On August 8, 1978, Earl was arraigned and counsel appointed to represent him, Hon. William B. Norment, Jr. [A, 4-5]. Earl pled "not guilty" [A, 5]. Separate counsel was appointed for Elmer, Hon. H. Carlton Buchanan [Transcript of State Record, hereinafter TR, 6]. Elmer also pled "not guilty" [TR, 7].

The Wileys' trial was jointly held on September 20, 1978 [Transcript of Evidence, hereinafter TE, 1]. The jury found both Earl and Elmer guilty of first degree burglary and theft, sentencing each to 10 and 5 years, respectively [A, 6-7]. At the persistent felony phase of the trial held that evening, the same jury found the Wileys guilty and sentenced them to life imprisonment [A, 8]. Judgment was entered October 2, 1978, sentencing Earl to life [A, 9-10].

The Wileys appealed to the Supreme Court of Kentucky, which affirmed their convictions on September 11, 1979. Wiley v. Commonwealth, Memorandum Opinion Per Curiam (File No. 78-SC-626-627-MR) [Appendix to Petition for Writ of Certiorari, hereinafter P, 64-67]. Earl filed a petition for writ of habeas corpus and supporting memorandum in the district court on December 3, 1979 [Docket Entry, hereinafter DE, 2; A, 159-163]. The magistrate's report and recommendation was filed on March 3, 1980 urging denial of the petition [DE, 5; P, 50-63]. Wiley's objections were filed on March 11, 1980 [DE, 7; A, 179-181]. Respondent filed no objections. On March 3, 1980, the district court adopted the magistrate's report and entered a judgment denying the petition

[DE, 8; P, 48-49]. On May 5, 1980, Judge Johnstone issued a certificate of probable cause [DE, 13; A, 188]. On April 24, 1981, the United States Court of Appeals for the Sixth Circuit reversed the judgment of the district court [P, 31-47].

B.

STATEMENT OF THE FACTS

The first witness at trial, Margaret Rummans of Budget-Rent-A-Truck, testified that on July 13, 1978, at around 1:00 or 1:15 p.m., she rented a cargo van to Earl Wiley [A, 12, 14].

The next witness, Kenneth Tegethoff, testified that around 2:15 p.m. on July 13, 1978, he observed a Budget-Rent-A-Truck leave from behind his father's house [A, 19, 21-22]. There were two white males in the truck but Mr. Tegethoff could not identify them [A, 26]. After discovering that a sewing machine was missing, Mr. Tegethoff called the sheriff [A, 23-24]. The next day Mr. Tegethoff identified a similar truck which contained numerous items belonging to his parents [A, 27, 29-37].

The Assistant Police Chief of Providence, Bob Williams, testified that around 2:40 or 2:45 p.m. on July 13, 1978 [A, 55], a van answering the description of the van seen at the Tegethoff home was stopped at a roadblock [A, 49]. Williams identified Earl Wiley as the driver of the van [A, 50-51], and Elmer as a passenger [A, 53]. Williams testified that Earl gave him a receipt for a driver's license with his name on it [A, 505]. Shortly thereafter, Earl fled [A, 52]. On cross-examination, Williams described Elmer as "tired and sleepy and worn out and possibly with a hangover" [A, 57].

The sixth witness at trial was Bobby Lee Sauls, Sheriff of Webster County [A, 59]. Sauls testified that when he arrived where the van had been stopped, Elmer was in custody and another person had fled [A, 61]. Sauls testified that he entered the vehicle and removed a .22 pistol and other tools from a pillow slip on the floor between the front seats [A, 66-67]. Sauls also stated that Elmer had told him "it was his brother that was with him and he (Elmer) was helping him move" [A, 62-63]. Earl's motion for a mistrial was overruled, but the jury was admonished

to disregard the statement [A, 63-64]. On cross-examination, Sauls testified that he found some cans of beer in the back of the van [A, 72]. Elmer was described as "shaking and in pretty bad shape" [A, 73]. Sheriff Sauls permitted Elmer to drink the beer [A, 73].

At the close of the evidence, counsel's motion for a directed verdict of acquittal was overruled [A, 75-77]. A defense request for an instruction on circumstantial evidence was also refused [A, 78-82]. Finally, counsel's request for instructions on the lesser degrees of burglary (second and third degree) was refused [A, 82].

The closing argument for both Earl and Elmer was made by Hon. William B. Norment, Jr. [A, 83]. During this argument, Mr. Norment repeatedly admitted that both Earl and Elmer were guilty [A, 87-88, 90-91, 93, 96-97]. After informing the jury that Mr. Buchanan and he were "appointed to represent these two men," Mr. Norment argued:

> Often times when a lawyer gets involved in a case, he gets stars in his eyes and he starts having notions that there may be some way, you know, if I examine this case... and I do my homework and I go out and I investigate as much as I can and I interview all the witnesses, that I'll be able to get a man off. That I will be able to prove to a jury that he is not guilty with what they have got him charged with.
>
> The stars aren't in our eyes in this case, ladies and gentlemen. They never have been. We're all adults. We're all mature thinking human beings...
>
> * * * *
>
> But as I said, the stars aren't in my eyes in this case. And they are not in Mr. Buchanan's eyes. Because unfortunately for these two men that you see here today, they are guilty. They're guilty as charged by the Commonwealth's Attorney's office.
>
> Mr. Walker in voir diring you all said, do you understand that the indictment...doesn't become a question of fact until I prove beyond a reasonable doubt that they are in fact guilty.
>
> We have to stand and give him credit for that because, ladies and gentlemen of the jury, he has proved to you beyond a reasonable doubt that these gentlemen are guilty of this crime. We don't have stars in our eyes, and we never have. They're guilty. [A, 87-88.]

* * * *

I couldn't stand up here and argue to you on behalf of Earl Wiley -- you know there were no eye witnesses, and I could make the same argument about Elmer Wiley -- you know there were no eye witnesses, nobody saw them go in and come out. I'm not that foolish. I'm not that naive. And I know you're not.
I know, and you know, you're going to give these men time in the penitentiary. And they know it, or they had better know it after they've heard the evidence here today. They're going to the penitentiary. That part's easy because they're guilty. I can't stand up here and say they didn't do it, they haven't proven that they did it, I'd be foolish and naive and immature. Because they did do it. And the Commonwealth's Attorney's office has proven to you that they have done it. [A, 89-90.]

* * * *

I told you before we know they are going to the penitentiary. And they know that they're going to the penitentiary. And you know they're going to the penitentiary.

* * * *

...It's bad, and it's a crime, and you know and I know and they know they are going to the penitentiary.... [A, 91-92.]

* * * *

Ladies and gentlemen, we submit to you that in this case, in this case, that we are here about today the question of guilt is absolutely clear. Absolutely clear, beyond a question of a doubt. You know sometimes we stand up and we argue beyond a reasonable doubt. We don't have that argument here today. We don't have that argument here today. I don't think there is a reasonable doubt. I don't think there is a shadow of a doubt that these two men are guilty. [A, 93.]

We ask that you be a compassionate jury and a merciful jury within reason because we know good and well as I stand here today that you're going to find these boys guilty. I know you are going to find them guilty. There is no question in my mind about it. There is no question in your mind about it... I'd venture to say that there's not a single one of you sitting here who is not going to say that these boys are guilty. I know that. It's going to happen. We know that it is going to happen.

* * * *

These boys are guilty. And they need to be punished. And they ought to be punished. And I'd be a lying fool to the citizens of Henderson, Kentucky, if I told you you otherwise. [A, 96-97.]

During his closing argument the prosecutor commented to the jury that he thought

> ...when Mr. Norment started in to his argument, and he was about half way through it that I would just stand up and say, I accept his argument. I thought that he did admirably well for about half of it, arguing for the prosecution. [A, 98.]

After fifteen minutes of deliberations, the jury returned a verdict finding both Earl and Elmer guilty of first degree burglary and theft and sentencing each to 10 and 5 years, respectively [A, 106].

During the persistent felony offender stage of the trial, Barbara Gregory, Deputy Clerk of the McCracken Circuit Court, was called as a witness. Mrs. Gregory read three judgments to the jury which indicated that Earl Wiley had been previously convicted of three counts of dwelling house breaking on August 23, 1974 [A, 107-116]. Counsel's motion for a directed verdict of acquittal was overruled [A, 121-122]. Elmer's lawyer, Mr. Buchanan, argued in closing for both Earl and Elmer. Mr. Buchanan admitted that both Earl and Elmer were guilty of being persistent felons [A, 125], although the record does not reflect any consent or waiver by Earl or Mr. Norment.

> Elmer and Earl Wiley have been here before. Each of these men has been previously adjudged guilty of going where they had no right to be, and taking what did not belong to them. That's in the record here.
>
> Earl in 1974. Elmer in 1972. Both in McCracken Circuit Court down in Paducah. In the most literary sense of the term, ladies and gentlemen, when that happened in '74 and '72 to him, both of these men incurred a debt to society...
>
> Elmer Wiley's first debt in '74 -- excuse me, in '72, and Earl's first one in '74, that that means that you must assess an ultimate toll here today that is far far heavier than anything that you have done before. [A, 124-126.]
>
> * * * *
>
> I submit that you folks had a very very strong suggestion, a very very strong indication before you were sent out the first time garnered from Mr. Norment's statement that these guys had been down the road before. Well there it is. They have. They have been down the road before and they are still on the same road.... [A, 127.]
>
> * * * *

> We don't ask you folks for mercy here. I feel there's little enough of that in the world anyway and what there is isn't to be applied in a case like this. These men are guilty. They are guilty of a serious crime. We haven't tried to duck that. We haven't tried to pull any wool over your eyes on that. [A, 129.]

In response to this argument, the prosecutor noted that the two sides were only "fighting over how much time should those two gentlemen have" [A, 130]. "Mr. Buchanan says that both of these gentlemen have been down the road before" [A, 130]. After ten minutes deliberations, the jury found both Earl and Elmer guilty as second degree persistent felons and sentenced each to life imprisonment [A, 8, 136].

On appeal Wiley's principle contention (and that of his brother) was that his lawyer admitted guilt on his behalf without his permission. The Supreme Court of Kentucky was presented with arguments that: 1) Wiley's counsel was ineffective in admitting Wiley's guilt without his consent; 2) Wiley's counsel was ineffective in admitting Wiley's guilt regardless of Wiley's consent as this was not, under the circumstances of this case, a legitimate "trial tactic;" and 3) Wiley was denied due process of law because the record did not affirmatively demonstrate Wiley's consent to his lawyer's guilty plea on his behalf. [See briefs in Kentucky Supreme Court, Wiley v. Commonwealth, File No. 78-SC-626.] The Court took the unusual step of permitting trial counsel for both defendants to file an "amicus curiae brief" in support of the Commonwealth's position on appeal detailing their trial strategy and asserting that they rendered effective assistance of counsel to their former clients [A, 137-147]. Furthermore, attached to the brief and filed in the Supreme Court of Kentucky was an affidavit from the trial judge expressing his opinion that trial counsel were "competent, professional and enthusiastic" in their representation of the Wileys at trial and "did their best to see that their clients received a fair trial" [A 146]. The trial judge specifically approved the trial "strategy" of admitting guilt [A, 146-147]. Trial counsel were described as "honest, diligent and capable lawyers..." whose performance in the trial court was consistent with this description [A, 147].

Neither the brief filed by the two trial counsel for the Wileys, nor the affidavit of the trial judge, suggested or stated that either or both of the Wiley brothers consented to this "strategy". Additionally, the Supreme Court of Kentucky permitted each Wiley to respond to the amicus brief [A, 148-153]. Earl Wiley described the "strategy" as "an unconsented to plea of guilt" [A, 149]. Elmer Wiley stated he "never consented to the admissions of guilt made by trial counsel" [Brief for Elmer Wiley in Response to Amicus Curiae Brief, hereinafter EWB, at 1]. Elmer's affidavit was filed with the Court. It states, in pertinent part:

> 3. At the trial of this case, the closing argument on behalf of affiant and his codefendant was made by the codefendant's attorney, William B. Norment, Jr.
>
> 4. During the course of the closing argument, Mr. Norment made several admissions that affiant and the co-defendant were guilty as charged.
>
> 5. Mr. Norment did not have affiant's consent to make the admission of affiant's guilt.
>
> 6. Affiant expressed his disapproval of the admissions of guilt made by counsel and counsel stated it would not make any difference.
>
> 7. Affiant was never advised of the possibility of a conflict of interest from Mr. Norment's joint representation of affiant and the codefendant. [EWB, Exhibit A.]

At no point in the state appeal did Kentucky contest the assertion of the Wileys that the admission of guilt by both counsel was done without the consent of, or consultation with, the defendants. [See Commonwealth's Brief in Kentucky Supreme Court.] In its opinion, the Kentucky Supreme Court rejected all of Wiley's arguments, stating in pertinent part:

> 5) Appellants contend they were denied effective assistance of counsel when defense counsel in closing chose to concede that appellants had been proven guilty and to argue instead for leniency, citing such facts as no endangerment to human life. This claim has never been presented to the trial court, hence we will not address it on appeal. [A, 156.]

When Earl Wiley filed his petition for writ of habeas corpus, he filed a sworn statement:

> B. Ground Two: Counsel's defacto plea of guilty not made with petitioner's voluntary and intelligent consent. [A, 159-160.]

In Wiley's memorandum in support of the petition, he states "...petitioner herein was challenging his guilt when trial counsel conceded his guilt" [A, 161]. Wiley quoted in his memorandum from his response to the amicus brief by trial counsel filed in the Supreme Court of Kentucky "...'trial strategy' can never include an unconsented-to plea of guilt" [A, 149, 162]. Again, in his memorandum below, Wiley stated: "Petitioner never acquiesced in counsel's admission of guilt..." [A, 163]. In Wiley's response to the Attorney General's answer below, Wiley again points out that the Commonwealth and trial counsel in their amicus brief have never alleged that Earl and Elmer consented to this "strategy":

> Nowhere in the amicus brief does it state that Petitioner consented to his "guilty plea" or was made aware that his trial counsel planned to present a complete admission of guilt as a "trial tactic." [A, 164].

At no point in the District Court did Kentucky contest Wiley's assertions that he never was informed of, nor did he consent to, either counsel's admission of guilt. Sowders did state: "We can only conclude that the petitioner deferred to his counsel's judgment in this matter" [Sowders Memorandum in District Court at 7, DE 3]. Sowders did not request an evidentiary hearing. Wiley did request an evidentiary hearing on this issue. In response to the Magistrate's Report, which recommended denial of the petition [A, 165-178], Wiley specifically objected to the failure to make a specific finding on the point of whether Wiley consented to counsel's admission of guilt:

> Finding of Fact No. 11 is incomplete and thus misstates the facts in that it fails to state that the admissions of guilt by counsel were made without the consent of Petitioner who had no

> prior knowledge that these admissions were to be presented to the jury by his counsel. [A, 179].

"Findings of Fact No. 11" had to do with counsel's admission of guilt [A, 169]. "Conclusion of Law No. 3" stated:

> There being no facts in dispute as raised by the petition, no evidentiary hearing is required. Townsend v. Sam, [sic] 372 U.S. 293. [A, 170].

Wiley requested an evidentiary hearing unless the Findings were corrected:

> Conclusion of Law No. 3 is contrary to law and to the evidence herein and should be set aside unless Finding of Fact No. 11 is corrected to state that Petitioner never consented to the admissions of guilt made by his trial counsel. See Townsend v. Sain, 372 U.S. 293... [A, 179].

The Magistrate also found, as a matter of law, that Wiley had "exhausted his state remedies..." [169-170]. Sowders did not file an objection to this conclusion of law. The District Court denied an evidentiary hearing, adopted the Magistrate's Report and dismissed Wiley's petition on the merits [A, 182-183].

On appeal to the Sixth Circuit, Wiley argued that unless his uncontradicted assertion that he did not consent to the lawyers' admissions of guilt was accepted, an evidentiary hearing was required [Wiley's Brief in Sixth Circuit at 22-24]. Sowders opposed this argument, arguing that a hering was unnecessary [Sowders Brief in Sixth Circuit, hereinafter SB, at 26]. Sowders also conceded that "he did not object to the magistrate's adverse finding..." on the question of exhaustion [SB, 1].

On April 24, 1981, the United States Court of Appeals for the Sixth Circuit unanimously held: First, Wiley had exhausted his state remedies on the issue of the effectiveness of trial counsel "by the unusual manner in whcih the claim came before..." the Kentucky Supreme Court [P, 40]. Second, Wiley was denied the effective assistance of counsel in vilation of the

Sixth Amendment of counsel's argument that Wiley was guilty despite counsel's "knowledge of petitioner's earlier 'not guilty' plea, and without petitioner's consent" [P, 45]. The Court stated:

> Petitioner first raised before the Kentucky Supreme Court his assertion that he did not consent to counsel's concession of guilt by his response to the amicus brief submitted by his trial counsel. No claim was ever made by trial counsel in their amicus brief to the Kentucky Supreme Court that their trial strategy was made known or consented to by petitioner. Petitioner reaffirmed his non-consent in his sworn petition for habeas corpus. Respondent did not dispute this issue. The United State Magistrate, in his finding of fact number 11, summarized the facts surrounding trial counsel's confession. The Magistrate's conclusion of law number 3 noted that no facts were in dispute. Petitioner objected to these findings insofar as they did not reflect his lack of consent to counsel's trial tactic. Petitioner's statement that he did not consent to counsel's trial tactic is not controverted. [P, 45].

Finally, the Court held that "...an alleged consent in the present case cannot be presumed from a silent trial record. Consent obtained without the protection of an on the record inquiry as required by Boykin v. Alabama, 395 U.S. 238 (1969)...is a nullity" [P, 45].

REASONS FOR DENYING THE WRIT

CONTRARY TO THE SUGGESTION OF THE PETITIONER, THE DECISION BY THE UNANIMOUS SIXTH CIRCUIT COURT OF APPEALS IS FACTUALLY CORRECT AND BASED UPON SUBSTANTIAL AND CONTROLLING LEGAL PRECEDENT OF THIS COURT. THE DECISION BELOW WAS BASED UPON THE UNCONTRADICTED FACTS IN THE RECORD WHICH WERE NOT PREVIOUSLY CHALLENGED BY KENTUCKY. THE DECISION BELOW IS NARROW IN SCOPE AND LIMITED TO THE UNIQUE FACTS OF THIS CASE. THE RESULT BELOW IS CONSISTENT WITH, AND REQUIRED BY, BROOKHART V. JANIS AND BOYKIN V. ALABAMA.

I.

THE DECISION OF THE SIXTH CIRCUIT REGARDING EXHAUSTION WAS CORRECT, WAS SPECIFICALLY TIED TO THE UNIQUE FACTS OF THIS CASE AND WAS PROPER BECAUSE RESORT TO FURTHER STATE PROCEEDINGS WOULD BE EXTREMELY TIME-

CONSUMING AND FUTILE. THE KENTUCKY SUPREME COURT HAD A MORE THAN "ADEQUATE OPPORTUNITY TO RULE ON THE RESPONDENT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM." ADDITIONALLY, SOWDERS SANDBAGGED THE ISSUE OF EXHAUSTION BY FAILING TO PRESENT IT TO THE DISTRICT JUDGE. FINALLY, SOWDERS' EXHAUSTION ARGUMENT DOES NOT APPLY TO THE ALTERNATIVE BASIS OF THE SIXTH CIRCUIT'S DECISION.

A. UNIQUE FACTS OF THIS CASE.

Wiley recognizes, of course, the doctrine of exhaustion of state remedies and the valid policy reasons supporting it. Picard v. Connor, 404 U.S. 270, 275 (1971). In essence, the federal claim must have been "fairly presented to the state courts" for the exhaustion requirement to be satisfied. Id. In the present case, Kentucky had the required "opportunity to pass upon the matter" in question. Fay v. Noia, 372 U.S. 391, 420 (1963). The exact claim presented to the Sixth Circuit and to the district court below was presented to the Kentucky Supreme Court. While Sowders is correct that Wiley has not attempted a state post-conviction action, exhaustion of every conceivable state remedy is not required. Petitioners are not required to repeatedly apply for relief in state court. See Brown v. Allen, 344 U.S. 443, 449 n.3 (1953). "Nor does the mere possibility of success in additional proceedings bar federal relief." Wilwording v. Swenson, 404 U.S. 249, 250 (1971). As the Supreme Court has stated in Fay v. Noia, "the rule of exhaustion 'is not one defining power but one which relates to the appropriate exercise of power.'" 372 U.S. at 420, quoting Bowen v. Johnston, 306 U.S. 19, 27 (1939). In fact, "[b]ecause exhaustion is not considered to be a jurisdictional prequisite, the federal courts have heard claims not previously considered by the state court." Galtieri v. Wainwright, 582 F.2d 348, 354 (5th Cir. 1978) (en banc).

Sowders claims that the Kentucky Supreme Court did not receive a fair opportunity to resolve Wiley's claim that trial counsel was ineffective. An examination of the record will demonstrate that this is not true. In Wiley's appeal to the Supreme Court of Kentucky, that court took the unusual step of

permitting trial counsel for both defendants to file an amicus curiae brief detailing their trial strategy and asserting that they rendered effective assistance of counsel to their former clients [A, 137-147]. Furthermore, attached to the brief and filed in the Supreme Court of Kentucky was an affidavit from the trial judge expressing his opinion that trial counsel were "competent, professional and enthusiastic" in their representation of the Wileys at trial [A, 146]. The trial judge specifically approved the trial "strategy" of admitting guilt [A, 146-147]. Additionally, the Supreme Court of Kentucky permitted Wiley to respond to the amicus brief [A, 148-153]. Wiley described, without contradiction, the "strategy" as "an unconsented to plea of guilt" [A, 149]. It is clear that the Kentucky Supreme Court, by virtue of its own orders, had before it the position of all parties concerned: Earl and Elmer Wiley, the Commonwealth, both trial counsel and the trial judge. Clearly, the issue of trial counsel's ineffectiveness was "fairly" presented.

The Commonwealth's reliance upon Picard v. Connor, supra, is misplaced. Sowders claims that Mr. Picard "had asserted virtually the same challenge in the context of state law on direct appeal..." [P, 3; emphasis added]. It is clear that the petitioner in Picard, unlike Wiley, did not present his federal constitutional claim on appeal.

B. FUTILITY

Assuming arguendo that Wiley did not "fairly present" his claim of ineffective assistance of counsel to the Kentucky Supreme Court, Wiley asserts that various exceptions to the exhaustion doctrine are applicable. In the present case, there is "an absence of available state corrective process..." and there exist "circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b). Sowders claims that Wiley is free to present the issue of ineffective assistance of counsel by means of a post-conviction motion in the state trial court under Kentucky Rule of Criminal Procedure 11.42. Sowders' argument ignores the fact that return

to the state trial court would be a "futile gesture." Coley v. Alvis, 381 F.2d 870, 872 (6th Cir. 1967). The state trial court has already indicated that trial counsel performed competently and that the trial court was in full agreement with counsel's strategy [A, 146-147]. In this sense, the present case is equivalent to a situation where a state post-conviction remedy does not exist. See generally Collins v. Perini, 448 F.Supp. 1006 (N.D.Ohio 1978), aff'd 594 F.2d 592 (6th Cir. 1979).

The Sixth Circuit's opinion met this issue head on and decided it correctly. The Court examined the reality of what happened in state court rather than accepting Sowders exultation of form over substance.

> ...we conclude that although petitioner's claim was not preserved before the trial court the claim was fairly presented to the state supreme court. Our opinion that petitioner's claim was fairly presented to the appellate court is further reinforced by the unusual manner in which the claim came before that court. Having submitted an affidavit to the state supreme court, the trial judge effectively foreclosed petitioner's further relief through the conventional post-trial motion. Petitioner's remedy at the trial court level was prejudiced and any further pursuit rendered futile. The exhaustion doctrine does not require pursuit of a state remedy where such a pursuit is clearly futile...
>
> Conversely, the fact that the appellate court received this expanded record placed that court in substantially the same position as if the post-trial motion had been made, denied, and incorporated into the appellate record. After receiving the affidavit which foreclosed petitioner's trial court remedies, the appellate court was obligated to decide the ineffective counsel claim on the merits. Petitioner cannot be penalized because the Kentucky Supreme Court refused to decide an issue put squarely before it. Likewise, it is settled that satisfaction of the exhaustion requirement "cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely presented in petitioner's brief in state court." Smith v. Digmon, 434 U.S. 332, 333 (1978). [P, 39-40].

Another reason exists, anticipated by Sowders, why return to state court at this point would be futile. Federal courts have not required exhaustion when "an analysis of the

state court's substantive holdings of federal law indicates that an application for relief by the prisoner to the state courts would be futile." Developments in the Law--Federal Habeas Corpus, 83 HARV.L.REV. 1038, 1098 (1970)(footnote omitted). See Blackledge v. Perry, 417 U.S. 21, 24 (1974) [This Court did not require further exhaustion after the Court of Appeals held that "resort to the state courts would be futile"]. Contrary to Sowders' assertion, an examination of Kentucky law demonstrates that Wiley has no hope of success upon his claim. Wiley's research has disclosed no Kentucky decision holding a trial counsel ineffective on the basis of his trial performance--especially when an alleged trial "strategy" is at issue. The decisions cited by Sowders are distinguishable. Raisor v. Commonwealth, 278 S.W.2d 635 (Ky. 1955) [trial court failed to grant a continuance to permit adequate preparation--no mention of trial counsel's performance]; Vaughn v. Commonwealth, 505 S.W.2d 768, 770 (Ky. 1974) ["appointed counsel was not allowed adequate time for preparation, and ...there was a serious potential of conflict of interest..."]; Flener v. Commonwealth, 514 S.W.2d 201, 202 (Ky. 1974) [co-counsel drunk at trial].

Wiley submits that the absence of Kentucky decisions finding trial counsel ineffective is due to the archaic standard applied by the Kentucky appellate courts. The performance of counsel must "shock the conscience" of the court and "render the proceedings a farce and mockery of justice." Wahl v. Commonwealth, 396 S.W.2d 774, 775 (Ky. 1965). As stated by Mr. Justice Brennan in his dissenting opinion in Wainwright v. Sykes, 433 U.S. 72, 117 (1977):

> ...the so-called "mockery" test... abdicates any judicial supervision over attorney performance so long as the attorney does not make a farce of the trial. [Emphasis added; footnotes omitted.]

Wiley submits that the absence of any realistic inquiry by Kentucky courts into the question of trial counsel's performance in general indicates that return to state court with his claim would be an exercise in futility. Anticipating this argument, Sowders relies upon United States ex rel. Williams v.

Israel, 556 F.2d 865 (7th Cir. 1977). The Israel court rejected a claim that exhaustion of state remedies was not required because Illinois applied a different standard for determining the effective assistance of counsel than did Illinois. However, the Seventh Circuit noted that it had "declared a rule of federal constitutional law..." and went on to state that "we have no reason to believe that...[our standard] will not be followed by the Illinois courts in ruling on claims of ineffective assistance of counsel based on the Sixth Amendment." Id. at 867. Implicit, therefore, in Israel, is the suggestion that if the state and federal courts apply significantly different standards regarding the effective assistance of counsel, then exhaustion would be pointless. Unlike the situation in Israel, there is a stark difference between the standards applied by this Court and Kentucky's highest court. Kentucky has flatly refused to apply the standard set down in Beasley v. United States, 491 F.2d 687, 693 (6th Cir. 1974), which requires a realistic inquiry into trial counsel's performance. Kentucky insists on clinging to the meaningless standard of "farce and mockery." In Perkins v. Commonwealth, 516 S.W.2d 873, 874 (Ky. 1974), cert. denied 421 U.S. 971 (1975), the Kentucky Supreme Court stated:

> The public defender, in a petition for rehearing, asserted that there is contrary higher authority in the opinions in the following federal cases from the Sixth Circuit: Beasley v. United States... The public defender, is, of course, in error in his claim that the Sixth Circuit opinions constitute controlling higher authority in the sense of establishing precedents binding on this court.

The Sixth Circuit, in Berry v. Cowan, 497 F.2d 1274, 1276 (6th Cir. 1974), took note of the continuing divergence between that Court and Kentucky courts regarding this issue:

> We note that the Court of Appeals of Kentucky... applied standards which this circuit has recently expressly rejected as measures of the effectiveness of counsel under the Sixth Amendment. [Emphasis added.]

C. NO DELIBERATE BY-PASS

Sowders claims that Wiley's actions before the Kentucky courts "smacks of a deliberate by-pass..." and even claims that the Sixth Circuit acquiesced "in such maneuvering" [P, 10]. This

is simply untrue. Contrary to Sowders' argument, Kentucky law makes it clear that errors of federal constitutional magnitude may be reviewed on direct appeal despite a technical failure to present the issue to the trial court. See Futrell v. Commonwealth, 437 S.W.2d 487, 489 (Ky. 1969); Jackson v. Commonwealth, 450 S.W.2d 224, 226 (Ky. 1970). The power of the Kentucky appellate courts to review plain error has been exercised in Stone v. Commonwealth, 456 S.W.2d 43, 44 (Ky. 1970); Murphy v. Commonwealth, 551 S.W.2d 838 (Ky.App. 1977) and Cobb v. Hoskins, 554 S.W.2d 886 (Ky.App. 1977). Furthermore, the Kentucky appellate courts have often addressed the issue of the effective assistance of counsel on direct appeal, although the issue had not been raised in the trial court. See, e.g., Meadows v. Commonwealth, 550 S.W.2d 511, 512-513 (Ky. 1977); Relford v. Commonwealth, 558 S.W.2d 175, 178 (Ky.App. 1977); Nickell v. Commonwealth, 565 S.W.2d 145, 149 (Ky. 1978). Indeed, Meadows dealt with a claim similar to Wiley's.

As pointed out by the Sixth Circuit [P, 39-40], there is no doubt that the Kentucky Supreme Court could have resolved the issue of the effectiveness of trial counsel when it was presented. The fact that the Kentucky Supreme Court declined to do so does not mean that Wiley has failed to exhaust his state remedies. See Wilwording v. Swenson, supra.

D. SOWDERS SANDBAGGED THE QUESTION OF AN EVIDENTIARY HEARING.

Buried within the first question presented is Sowders' claim that the Sixth Circuit should have ordered an evidentiary hearing [P, 15]. Of course, this assertion is made despite Sowders' argument below that an evidentiary hearing was unnecessary [SB, 26]. It is inappropriate, to say the least, for a litigant to wait until the United States Supreme Court to raise such a claim. As pointed out by Sowders, it is well established that generally a reviewing court should not consider an issue not raised below. E.g., Singleton v. Wulff, 428 U.S. 106, 120 (1976). This rule applies to the government as well as to habeas corpus petitioners. E.g., Robinson v. Berman, 594 F.2d 1, 3

(1st. Cir. 1979); Hopkins v. Jarvis, 648 F.2d 981, 983 n.2 (5th Cir. 1981); Messelt v. Alabama, 595 F.2d 247 (5th Cir. 1979). This Court has refused to consider contentions by the government in habeas proceedings which were waived below. E.g., Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980); Estelle v. Smith, ___ U.S. ___, 68 L.Ed.2d 359, 372 n.12 (1981).

Sowders claims that there is no evidence in the record to support the conclusion of the Sixth Circuit that Wiley did not consent to the two admissions of guilt by the two different lawyers [P, 15]. Actually, there is no evidence to contradict the sworn assertions by the Wileys that they did not consent. "Petitioner's statement that he did not consent to counsel's trial tactic is not controverted" [P, 45]. This was also true in the Supreme Court of Kentucky. Therefore, Sowders claim that Kentucky was deprived of an opportunity to resolve a factual dispute is meritless. In Sowders' view, there was no factual dispute worthy of a hearing until he filed his petition for writ of certiorari in this Court.

E. UNDUE DELAY

Another exception to the exhaustion doctrine which applies in this case deals with the specter of a lengthy delay prior to consideration of a petitioner's federal constitutional claim. Wiley has been incarcerated over three years pursuant to a conviction found to have been obtained in violation of the United States Constitution. The writ of habeas corpus is supposed to be a "swift and imperative remedy in all cases of illegal restraint and confinement." Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490 (1973). Since Kentucky does not apply the appropriate federal constitutional standard in determining whether Wiley received the effective assistance of counsel, it is likely he will find it necessary to return to federal court in order to obtain relief. This process could take a year and a half or more. The specter of "undue delay" strips the writ of habeas corpus of its intended force. In such a case, it would be proper to put aside the requirement of exhaustion of

state remedies, lest it be carried to an absurd extreme. Exhaustion ought not be required when the "state procedural snarls or obstacles preclude an effective state remedy." Bartone v. United States, 375 U.S. 52, 54 (1963). See also Dozie v. Cady, 430 F.2d 637 (7th Cir. 1970).

F. SOWDERS SANDBAGGED THE QUESTION OF EXHAUSTION.

In his initial petition, Wiley asserted that he had exhausted state remedies. [See Memorandum in Support of Petition, 3-8.] Sowders responded by claiming that petitioner had failed to exhaust state remedies. [See Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, 4-7.] Wiley's response was directed solely to this issue. [See Response to Motion to Dismiss.] The magistrate's report specifically rejected Sowders' argument and stated: "The petitioner has exhausted his state remedies by appealing all issues raised in this action to the Supreme Court of Kentucky." [A, 169-170; Conclusion of Law #2.] The magistrate's report gave "the parties" thirteen days to file written objections [A, 178]. 28 U.S.C. § 636(b)(1)(B) provides that a magistrate may review an application of a petitioner for post-conviction relief and make recommendations to the district judge. However, that statute requires "written objections to such proposed findings and recommendations." Further, the district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." See 28 U.S.C. 2254, Rule 8(b)(3)(4) [Emphasis added]. By Sowders own admission, Sowders failed to register any objection to the magistrate's report that Wiley had exhausted state remedies [AB, 1]. The effect of this was that no issue of exhaustion of state remedies was ever presented to the district court. As in Smith v. Goquen, 415 U.S. 566, 576 n.19 (1974), the "exhaustion--of--remedies argument is belatedly raised..." [Emphasis added.] "[I]t appears that appellant did not raise his present exhaustion--of--remedies argument before the district court." Id.

The failure to object to a recommendation of the magistrate has the practical effect of failing to bring the issue to the attention of the district judge. It constitutes a waiver of any right to complain in the appellate court. See United States v. Walters, 638 F.2d 947 (6th Cir. 1981). In the district court's judgment, it is indicated that the court made a "de novo determination" of only those portions of the magistrate's report to which objections were filed [A, 182]. The district judge otherwise accepted the magistrate's report. Therefore, the district court was unaware that there was any issue as to exhaustion of state remedies. Sowders cannot now complain. The unfairness of the Commonwealth's position is clear. Assuming arguendo that Wiley did fail to exhaust state remedies and the district judge had been presented with the issue, it is theoretically possible that Wiley could have returned to state court at that time. However, the Commonwealth has chosen to "sandbag" petitioner. By resurrecting the issue of exhaustion on appeal, Sowders has insured (assuming for sake of argument this Court grants review and agrees with his exhaustion analysis) "undue delay" in the final resolution of Wiley's federal constitutional claim regarding the effectiveness of his counsel. For obvious policy reasons, this Court should not permit a state to waive an exhaustion claim in the district court and then resurrect it on appeal.

G. DISCRETIONARY NATURE OF HOLDING BELOW

It is important to emphasize the discretionary nature of the power of the lower federal courts to entertain claims such as Wiley's, whether they are "technically" exhausted or not. See Shelby v. Phend, 445 F.2d 1326 (7th Cir. 1971), where the court held that the petitioner had exhausted state remedies as to one of three possible grounds. The Seventh Circuit held that "considerations of judicial economy" dictate that the petitioner's two unexhausted grounds be considered along with the issue on which he had exhausted state remedies. Id. at 1327. Similarly, it is too late in the day for Sowders to be claiming

that Wiley failed to exhaust state remedies as to one of the five issues presented on appeal to the Sixth Circuit.

H. THE EXHAUSTION ARGUMENT RELATES ONLY TO ONE BASIS OF THE SIXTH CIRCUIT'S DECISION.

Relying principally on Galtieri v. Wainwright, supra, Sowders not only argues that the claim of ineffective assistance of counsel must be dismissed for failure to exhaust state remedies, but that all of Wiley's claims should be dismissed [P, 16]. This rather extreme action is unjustified in the present case for a number of reasons. First of all, Sowders failed to point out that the "almost unanimous analysis of the circuits which have considered this question" resolve it contrary to Sowders' position. Miller v. Hall, 536 F.2d 967, 969 (1st Cir. 1976). The Commonwealth correctly states that the Fifth and Ninth Circuits require a district court to dismiss a "mixed petition"--one which contains both exhausted and unexhausted claims. Galtieri; Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976). However, all the other circuits advocate review of exhausted claims of federal constitutional error even when they appear in a "mixed petition." Five circuits have specifically adopted a rigid rule that requires district courts to consider exhausted claims presented in "mixed petitions." Miller v. Hall, supra; United States v. Deegan, 440 F.2d 304, 305 n.1 (2nd Cir. 1971); United States ex rel. Boyance v. Myers, 372 F.2d 111 (3rd Cir. 1967)(per curiam); Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); Tyler v. Swenson, 483 F.2d 611, 614 (8th Cir. 1973); Triplett v. Wyrick, 549 F.2d 57, 59-60 (8th Cir. 1977), refusing to overrule Tyler v. Swenson, supra. Three other circuits, including the Sixth Circuit, have not expressly articulated a rule. However, these circuits have repeatedly passed on the merits of appeals from decisions on the merits of claims in mixed petitions. Dombkowski v. Johnson, 488 F.2d 68, 70 (6th Cir. 1973); Meeks v. Jago, 548 F.2d 134, 137 (6th Cir. 1976), cert. denied, 434 U.S. 844 (1977); Brown v. Wisconsin State Dept. of Public Welfare, 457 F.2d 257 (7th Cir. 1972); Smith v. Gaffney, 462 F.2d 663 (10th Cir. 1972).

The substantial support for Wiley's position among the various circuits is persuasive on the issue presented. Wiley will not detail the numerous policy considerations supporting his position. The arguments are eloquently detailed in Judge Goldberg's dissent in Galtieri, 582 F.2d at 366-375. Among other things, 28 U.S.C § 2254(c) requires exhaustion of claims, not cases. Id. at 370. Addressing exhausted claims when properly presented reduces needless litigation in state court, is "entirely consistent with the purposes of the exhaustion doctrine," id. at 372, and, most importantly, demonstrates a sensitivity to the prisoner's interest in "speedy release from unconstitutional confinement." Id. at 375. It is worthy of note that in the Fifth Circuit, dismissal of "mixed petitions" was only approved by a widely divided court. The vote appears to be 8 to 6. Galtieri. Contrary to Sowders' claim, dismissal of a "mixed petition" leads to "piecemeal litigation" and is contrary to the interest of "judicial economy" [P, 16].

Most importantly, the theory relied upon by the Commonwealth deals with dismissal of "mixed petitions" by the district court. There is unanimous agreement among the circuits that once an exhausted claim reaches the appellate court, regarding which the district court reached the merits, the appellate court should also reach the merits despite the fact that the claim may have been originally presented in a "mixed petition." In fact, this is the basic thrust in Galtieri. The Ninth Circuit is in agreement. In Carothers v. Rhay, 594 F.2d 225 (9th Cir. 1979), the Court stated that when the lower court reaches an exhausted claim, the appellate court will do likewise.

Finally, neither the Fifth nor Ninth Circuits take a hard and fast approach to the "total exhaustion" rule. For example, there are many exceptions. In Gonzales v. Stone, supra, the Ninth Circuit referred to three exceptions: 1. "[S]ubstantial delay in state court proceedings; 2. "Reasonable explanation" for the failure to exhaust state remedies;" and 3. "considerations of fairness." Id. at 810. In Lamberti v. Wainwright, 513 F.2d 277, 284 (5th Cir. 1975), the court noted

two exceptions to the rule: 1. The prospect of state court relief is "tinged with delay..." and 2. waiver of the issue in the district court by the state. See also Kelley v. Estelle, 521 F.2d 238, 240-24] (5th Cir.]975), where the court reached the issue due to the considerations of fairness and judicial economy. Wiley submits that all of these exceptions to the rule are applicable to the case at bar. Especially relevant is the Fifth Circuit's exception regarding the failure to present the issue of exhaustion to the district court. As stated in West v. Louisiana, 478 F.2d 1026, 1034-1035 (5th Cir. 1973), aff'd regarding exhaustion en banc 510 F.2d 363 (1975): "Failure to raise a contention of lack of exhaustion at the district court level is ordinarly a bar to its consideration on appeal." To permit Sowders to "sandbag" the issue of exhaustion of state remedies and resurrect the issue on appeal would be a grave injustice, especially if Wiley's entire petition was to be dismissed. Most certainly, this would result in a lengthy delay before final adjudication of petitioner's federal claims. For all these reasons Wiley respectfully submits that this Court should not grant review.

II.

THE SIXTH CIRCUIT'S DECISION THAT WILEY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WAS CORRECT AND REQUIRED BY THIS COURT'S DECISION IN BROOKHART V. JANIS BECAUSE THE UNCONTRADICTED EVIDENCE SHOWS THAT WILEY DID NOT CONSENT (ON THE RECORD OR OTHERWISE) TO ADMISSIONS OF GUILT ON HIS BEHALF BY HIS LAWYER AND HIS CODEFENDANT'S LAWYER AT THE GUILT AND ENHANCEMENT PHASES OF HIS TRIAL, SUCH A DECISION IS NOT AN ORDINARY TACTICAL DECISION MADE IN THE HEAT OF THE TRIAL, AND ONE OF THE ATTORNEY'S ADMITTED DURING ARGUMENT THAT THEY WEREN'T ASKING FOR MERCY. FURTHERMORE, NO COMPETENT TRIAL STRATEGY COULD JUSTIFY COUNSEL'S ACTION UNDER THE CIRCUMSTANCES OF THIS CASE.

The record is uncontradicted that counsel admitted Wiley's guilt during both portions of his trial without his consent and foreknowledge. Wiley did not knowingly and intelligently consent to any "trial tactic" authorizing counsel, and especially his co-defendant's counsel, to admit his guilt to

either the substantive or persistent felon charges. Finally, even assuming arguendo Wiley's consent, the alleged "tactical" justification for admitting the defendant's guilt during the first phase of a persistent felon trial and arguing for "mercy" and then admitting guilt during the second phase and not asking for "mercy" is not a "reasonably competent" tactic. Therefore, Wiley has been denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel and due process of law. The decision below is undoubtedly correct.

A. UNCONSENTED TO PLEA OF GUILT

As demonstrated above, Wiley has consistently maintained, without contradiction, that he never consented to either counsel's admissions of guilt. Clearly, counsel cannot plead the accused guilty against the defendant's desire. White v. Ragen, 324 U.S. 760 (1945); Palfy v. Cardwell, 448 F.2d 328, 330 (6th Cir. 1971). Again, this is a personal decision for the client. Brookhart v. Janis, 384 U.S. 1 (1966). Wiley has been denied effective assistance of counsel. As stated by the Sixth Circuit:

> Unquestionably, the constitutional right of a criminal defendant to plead "not guilty," or perhaps moire acurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea. We, therefore, hold that petitioner was deprived of effective assistance of counsel when his own lawyer admitted his client's guilt, without first obtaining his client's consent to this strategy. [P, 46].

B. ADMISSION OF GUILT BY CO-DEFENDANT'S LAWYER

Even if an attorney may admit his client's guilt in argument without violating the Sixth Amendment, certainly a co-defendant's lawyer cannot. Wiley was clearly denied his right to counsel during the second phase of the trial. See generally DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962) [prejudicial comments by attorney for co-defendant].

C. CONFICT OF INTEREST

Wiley's counsel was in a conflicting position in admitting his client's guilt and arguing for "mercy" for Wiley

and his co-defendant. (The same holds true for co-counsel during the second phase.) In order to represent Wiley's co-defendant, counsel had to ignore individual elements of mitigation pertaining to only Earl or only Elmer. Wiley was denied effective representation by a conflict-free attorney. See generally Glasser v. United States, 315 U.S. 60 (1972); Holloway v. Arkansas, 435 U.S. 475 (1978).

D. REASONABLY COMPETENT TRIAL TACTIC

This Court has indicated in McMann v. Richardson, 397 U.S. 759, 771 (1970), that the Sixth Amendment requires that a criminal defendant receive "advice...within the range of competence demanded of attorneys in criminal cases." In Tollett v. Henderson, 411 U.S. 258, 264 (1973), the Court apparently reaffirmed the McMann standard. The Sixth Circuit has viewed McMann and Tollett as holding that the "reasonably competent" standard is mandated by the Federal Constitution. Beasley v. United States, 491 F.2d 687, 693 (6th Cir. 1974); see also Marzullo v. Maryland, 561 F.2d 540 (4th Cir.), cert. denied 435 U.S. 1011 (1978). Therefore, assuming arguendo counsel's admission of guilt was a "trial tactic" and that Wiley intelligently consented to it (a big assumption), the trial tactic must be a "reasonably competent" one. In holding that an attorney may waive his client's "Sixth Amendment right of confrontation by stipulating to the admission of evidence" the Fifth Circuit required a showing of the agreement of the defendant and a demonstration that "the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy." United States v. Stephens, 609 F.2d 230, 232-33 (5th Cir. 1980). In the present case counsel's "tactic" was not reasonably competent. It certainly was not prudent.

Wiley submits that the motions of trial counsel at the close of the evidence demonstrate that their assessment of the case was not as hopeless as they asserted in their amicus brief. Counsel requested a directed verdict "...on the grounds that the evidence elicited by the Commonwealth...failed to make out a prima facie case of burglary in the first degree..." [A, 75-76].

A motion was also made for an instruction on circumstantial evidence. [A, 78].

Counsel also requested lesser included instructions [A, 82]. It is clear that counsel had various arguments available other than that which they ultimately pursued. The jury was only instructed on the highest degree of burglary. A reasonable argument could be made that the Commonwealth failed to prove that degree of burglary. There was no proof that either Earl or Elmer were armed with a pistol during the burglary. Counsel could have attacked this required element in the instructions.

Other potential issues were referred to by counsel during closing argument. "You know there were no eyewitnesses, nobody actually saw them go in and come out" [A, 89-90]. Reference was made to a possible issue of intoxication. Counsel argued: "[t]hese men were drinking. There was beer in the car. Officer Sauls said that Elmer, when they first stopped this truck, said well yes he was shaking, he was coming down with a hangover" [A, 95].

Additionally, counsel's argument appears to betray the alleged tactical justification. Counsel seemed concerned with being "foolish" and "naive" and "immature" [A, 90]. Counsel did not wish to be a "lying fool to the citizens of Henderson, Kentucky" [A, 97]. Finally, counsel contradicted their own alleged tactical justification. In the persistent felon phase, counsel argued:

> We don't ask you folks for mercy here. I feel there is little enough of that in the world anyway and what there is isn't to be applied in a case like this. These men are guilty. They are guilty of a serious crime. [A, 129; emphasis added.]

The Sixth Circuit noted that: "The specific strategy is unclear, particularly when counsel told the jury he was not asking for mercy" [P, 36].

Wiley does not contend that there will never be a case where an admission of guilt could not be tactically justified.

For example, a defendant facing a death sentence may wish to admit his guilt and throw himself on the mercy of the jury. However, this is not such a case. Since there were no lesser included offenses submitted to the jury during the first phase, counsel's argument for "mercy" is irrelevant. Wiley was facing a charge of second degree persistent felony offender which permits enhancement of a sentence to the next highest degree--regardless of whether the jury returns the minimum or maximum punishment in the normal sentencing range. Ky. Rev. Stat. 532.080(2). Since the persistent felony proceeding is often "automatic" enhancement under Kentucky law--an admission of guilt during the first portion of the trial has drastic consequences for the defendant. Furthermore, contrary to counsel's theory, the jury is likely to (and apparently was in this case) angered by counsel's apparent "candor" when they find out that the defendant has been convicted of prior felonies. Instead of the intended benefit, counsel's tactics produced the opposite effect. Counsel's admissions of guilt during each phase of Wiley's trial was not a reasonably competent trial tactic. As stated by the Sixth Circuit:

> Under the facts of this case, however, no such claim [that no prejudice resulted from counsel's admissions] could seriously be raised. Despite strong circumstantial evidence against petitioner, no witness observed the burglary. No one saw a gun in the hand of either defendant. Yet use of a "deadly weapon" is one of the essential elements under Kentucky law of first degree burglary. Who can be sure that both or either of these brothers would have been convicted had not the jury been told by defendant's own attorney "they're guilty"? [P, 46-47].

E. AN ADMISSION OF GUILT IS NOT EQUIVILENT TO ORDINARY TACTICAL DECISIONS MADE BY COUNSEL AT TRIAL. THE FLOODGATES WILL REMAIN CLOSED.

Sowders argues with some vigor that the decision below will provoke a "flood of claims" [P, 25] with "tremendous repercussions...the criminal defendant's consent will have to appear in the record on such matters of strategy as the...failure to object...the type of questions to be asked of witnesses..." [P, 19]. Were this true, Wiley would certainly agree that review by this Court would be imperative. However, as is quite obvious, this contention is utter nonsense.

F. NO CONFLICT

Sowders failed to cite a single decision in conflict with the opinion below with the exception of the decision of the Kentucky Supreme Court in Wiley's case (a situation which occurs in every instance a federal court grants habeas relief.) For all the reasons stated above, this Court need not and should not grant review.

III.

THE SIXTH CIRCUIT'S DECISION THAT WILEY WAS DENIED DUE PROCESS OF LAW BY THE ADMISSION OF GUILT ON HIS BEHALF BY THE TWO LAWYERS, IN THE ABSENCE OF ANY INDICATION IN THE RECORD OF WILEY'S CONSENT, IS CORRECT AND REQUIRED BY THIS COURT'S DECISION IN BOYKIN V. ALABAMA SINCE COUNSEL'S ADMISSIONS IN THIS CASE CONSTITUTED THE FUNCTIONAL EQUIVILENT OF A GUILTY PLEA.

The Sixth Circuit's decision is totally consistent with this Court's landmark decision in Boykin v. Alabama, 395 U.S. 238 (1969).

> The decision to plead "guilty" or "not guilty" is a decision reserved solely for the accused based on his intelligent and voluntary choice. Boykin v. Alabama, 395 U.S. 238 (1969). The defendant's decision to plead guilty cannot be presumed from the plea itself in the context of an otherwise silent record. Instead, the trial court must make an on the record inquiry of the defendant to insure that the defendant's plea is voluntary and intelligent. Id., at 243-244 [P, 42-43].
>
> * * * *
>
> In those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin, supra.
>
> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue. [P, 46].

In Boykin, 395 U.S. at 241, this Court held that because a guilty plea involves the waiver of basic constitutional rights, the record of the court accepting such a plea must demonstrate "an affirmative showing that it was intelligent and voluntary." The traditional guilty plea situation is tantamount to a waiver of three important federal rights: "First, the privilege against self-incrimination guaranteed by the Fifth Amendment... Second, is the right to trial by jury... Third, is the right to confront one's accusers..." Boykin, 395 U.S. at 243-244. Contrary to Sowders suggestion [P, 27-28], Wiley forfeited the same basic rights in the present case by virtue of his counsel's unilateral action. Wiley chose not to testify. Therefore, counsel's admissions waived Wiley's right to remain silent. Similarly, Wiley chose to plead not guilty and submit the case to a jury. Counsel's admissions of guilt negated Wiley's decision to be tried by a jury. Finally, although counsel did engage in some cursory cross-examination, the nature of this cross-examination was equivalent to none at all. Therefore, counsel's admissions of guilt have the same effect as a conventional plea of guilty.

Sowders' argument overlooks the crucial fact that in Boykin the prosecution presented its case regarding guilt despite the plea. Furthermore, "counsel for petitioner engaged in cursory cross-examination..." as in the this case. 395 U.S. at 240. There are more similarities between the present case and Boykin than Sowders would care to admit. In actuality Wiley is worse off than the petitioner in Boykin. After all, at least Edward Boykin entered his own plea of guilty. In the present case, Wiley was never heard from and his lawyer entered his plea of guilty. As Mr. Justice White pointed out in his concurring opinion in Henderson v. Morgan, 426 U.S. 637, 650 (1976):

> ...it is too late in the day to permit a guilty plea to be entered against a defendant solely on the consent of the defendant's agent -- his lawyer. Our cases make absolutely clear that the choice to plead guilty must be the defendant's... it is on his

admission that he is in fact guilty that his conviction will rest. [Emphasis added].

An attorney simply does not have the power to enter a plea which is contrary to his clients expressed plea in open court. In the present case, Earl Wiley pled not guilty and never indicated a desire to change that plea. In Brookhart v. Janis, 384 U.S. 1, 6 (1966), the defendant's lawyer agreed to a "prima facie trial" The Court assumed that the lawyer "knowingly agreed that the state need only make a prima facie showing of guilt and that ne would neither offer evidence on petitioner's behalf nor cross-examine any of the state's witnesses." 384 U.S. at 7. There was a confusing colloquy at trial in which the defendant stated that he was not pleading guilty. This Court stated:

> The record shows, however, that petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea...
>
> * * * *
>
> Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances. Id.

The situation is even more serious when counsel acutally admits guilt, as compared to merely stipulating to evidence, etc. Compare Symons v. Klinger, 372 F.2d 47, 50 (9th Cir. 1967). Stipulations by counsel admitting elements of a crime have often been condemned, absent an inquiry of the defendant by the trial judge. See, e.g., United States v Brown, 428 F.2d 110 (D.C. 1970); Cox v. Hutto, 589 F.2d 394 (8th Cir. 1978), on remand 476 F.Supp. 906 (E.D.Ark. 1979), aff'd 619 F.2d 731 (8th Cir. 1980). Sowders cites no authority to the contrary. Since the decision below is consistent with prior decisions of this and other courts, review should be denied.

CONCLUSION

For the reasons stated in this Brief, respondent Wiley respectfully requests this Court to deny the petition for a writ of certiorari filed in his case.

Respectfully submitted,

KEVIN MICHAEL MCNALLY
ASSISTANT PUBLIC ADVOCATE
State Office Building Annex
Third Floor
Frankfort, Kentucky 40601
(502) 564-5255

COUNSEL FOR RESPONDENT

C. THOMAS HECTUS
ATTORNEY AT LAW
Gittleman, Charney & Barber
Suite 800, Marion E. Taylor Bldg.
Louisville, Kentucky 40202
(502) 585-2101

OF COUNSEL

NO. 81-113

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

DEWEY SOWDERS, SUPERINTENDENT,
KENTUCKY STATE REFORMATORY — PETITIONER

VS. CERTIFICATE OF SERVICE

EARL WAYNE WILEY — RESPONDENT

* * * * * * * * *

I, Kevin Michael McNally, counsel for respondent, certify that the attached Brief for Respondent in Opposition and Motion For Leave To Proceed In Forma Pauperis was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C., 20543, and to counsel for respondent, Hon. Michael R. Beiting, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 6th day of October, 1981, by personally depositing same in a United States mail box, first-class postage prepaid.

KEVIN MICHAEL McNALLY
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE
UNITED STATES SUPREME COURT

COUNSEL FOR RESPONDENT

Subscribed and sworn to before me by Kevin Michael McNally, this 6th day of October, 1981.

NOTARY PUBLIC, STATE AT LARGE

My Commission Expires: 11-13-84.

NO. 81-113

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

DEWEY SOWDERS, SUPERINTENDENT,
KENTUCKY STATE REFORMATORY — PETITIONER

VS.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

EARL WAYNE WILEY — RESPONDENT

* * * * * * * * * *

The respondent, Earl Wayne Wiley, asks leave to file the attached Brief for Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner has been permitted by both the Kentucky and federal courts to proceed as an indigent at all stages of this action. The undersigned was appointed as counsel under the Criminal Justice Act of 1964 by the United States Court of Appeals for the Sixth Circuit. Pursuant to Rule 46.1 no affidavit of indigency is required.

Respectfully submitted,

KEVIN MICHAEL McNALLY
ASSISTANT PUBLIC ADVOCATE
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601
(502) 564-5255

COUNSEL FOR RESPONDENT

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 81-113

SUPREME COURT OF THE UNITED STATES

October Term, 1981

DEWEY SOWDERS, Superintendent, Kentucky State Penitentiary - - - Petitioner

versus

EARL WAYNE WILEY - - - - - Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

STEVEN L. BESHEAR
Attorney General

MICHAEL R. BEITING
Assistant Attorney General

PAUL E. REILENDER, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4058
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3291, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-113

DEWEY SOWDERS, Superintendent,
Kentucky State Penitentiary - - *Petitioner*

v.

EARL WAYNE WILEY - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The Respondent has made several factual misstatements in his Brief in Opposition [hereinafter cited BO] which the Petitioner feels merit reply.

First, Respondents suggests that Wiley's principle contention on appeal to the Kentucky Supreme Court was that "his lawyer admitted guilt on his behalf without his permission" (BO 6). In fact, this was not the case. Wiley contended in the Kentucky Supreme Court that whether or not he acquiesced in his trial counsel's strategy was irrelevant because the "courts have recognized that even an informed admission of guilt may, under some circumstances, trigger the need for a *Boykin* inquiry" (see Respondent's Brief in Kentucky Supreme Court at p. 18). It is thus apparent that in actuality, Wiley's contention in the

Kentucky Supreme Court was first, that his trial counsel's tactic was an ineffective one; and secondly, that regardless of his consent or lack thereof, there had to be an on-the-record inquiry pursuant to *Boykin* showing whether or not he knowingly, voluntarily and intelligently consented to his counsel's action. Accordingly, Respondent's statement that his principle contention in his state appeal was a factual one, with repect to the consent issue, is totally without basis.

Secondly, Respondent states in his Brief in Opposition that the Kentucky Supreme Court permitted trial counsel for Respondent "to file an amicus curiae brief in support of the Commonwealth's position" on appeal (BO 6). This is absolutely false. Trial counsel filed the amicus curiae brief of their own volition to explain their trial strategy to the Kentucky Supreme Court (see the amicus brief filed as part of the Sixth Circuit Joint Appendix, hereinafter JA 137-147). They were not supporting the Commonwealth in any way, shape or form and that was understood when the amicus brief was filed.

Thirdly, Respondent inappropriately attempts to interject the case of his brother, Elmer, into this proceeding (BO 7). It is true that in his response to the amicus curiae brief filed by trial counsel in the Kentucky Supreme Court, Elmer claimed he did not consent to the trial strategy and attached an affidavit to that effect (Brief for Elmer Wiley in Response to Amicus Curiae Brief, hereinafter EWB 1, Exhibit A). The affidavit filed by Elmer in his habeas corpus action in the United States District Court was controverted by

an opposing affidavit of both trial counsel stating they had informed Earl and Elmer Wiley of their trial strategy and that both men agreed to it. However, since this Court is not faced with the case of Elmer Wiley any refernce to the record in his case, which is not before this Court, is clearly inappropriate. Petitioner need only point out to this Court that Respondent in this case, Earl Wayne Wiley, did not file such an affidavit in the Kentucky Supreme Court supporting his allegation of non-consent, and that no such affidavit was before the Sixth Circuit when it rendered its decision.

Fourthly, the Respondent again argues in his Brief in Opposition that the factual importance of the allegedly unconsented-to admission of guilt was raised in the United States District Court and never challenged by Kentucky (BO 8). The Respondent cites a portion of his memorandum filed in the District Court stating, "Petitioner never acquiesced in counsel's admission of guilt . . ." (BO 8, JA 163). However, the Respondent neglects to supply this Court with the remainder of the sentence which diminishes the factual importance of consent to the resolution of the legal issues in the case: "in any event that circumstance is irrelevant, for courts have recognized that even an *informed* admission of guilt may, under certain circumstances, trigger the need for a *Boykin inquiry*" (Earl Wiley's Habeas Corpus Memorandum, hereinafter HCM 17-18). It thus becomes apparent that the reason Kentucky never challenged the consent issue in District Court was because Earl Wiley did not make it

an issue. Respondent also points out in his Brief in Opposition that Sowders did not request an evidentiary hearing on this issue but that Wiley did (BO 8). This is not technically correct. Wiley did not request an evidentiary hearing in his petition for writ of habeas corpus. It was not until after the magistrate's report was filed, recommending that the petition be denied, that Wiley sought to have an evidentiary hearing.

Fifth, the Respondent correctly points out that the Sixth Circuit held "that . . . an alleged consent in the present case cannot be presumed from a silent trial record" (BO 10). However, the Sixth Circuit then turned around and presumed a *lack of consent from a silent record* and made a factual finding when there was no evidence in the record to support it.

Sixth, with respect to the exhaustion argument, Respondent suggests that the issue of consent to the trial strategy presented to the Sixth Circuit was also presented to the District Court and the Kentucky Supreme Court (BO 11). The Petitioner respectfully disagrees. In the Sixth Circuit, Respondent raised and vigorously argued, for the first time, the fact that whether or not Respondent had consented to his trial counsel's strategy was the controlling factor in determining whether there was ineffective assistance of counsel.

Seventh, Respondent would have this Court believe that it would be futile to require him to go back and exhaust state remedies with respect to his ineffective assistance of counsel claim (BO 12-15). He argues

that the trial court had already indicated that trial counsel performed competently, and the trial court was in full agreement of trial counsel's strategy (BO 13). Again, Petitioner disagrees. The issue of whether or not the Respondent and his brother had actually consented to the trial strategy was never presented to the trial court, and the trial judge could not have been aware of the consent issue at the time he made his affidavit. Clearly then, it cannot be said that it would be futile to require Wiley to exhaust state post-conviction relief procedures (Kentucky Rule of Criminal Procedure, hereinafter RCr 11.42) when the factual dispute concerning consent had never been brought to the trial judge's attention. Further, it was inconsistent for Respondent to argue in federal court that he had exhausted his state remedies while contending that a federal evidentiary hearing was necessary to resolve the facts in his favor. This type of factual contention should have been resolved in state court under the procedure provided for under RCr 11.42.

Eighth, Respondent suggests that Petitioner, Sowders, has "sandbagged" the question of the evidentiary hearing (BO 16). Sowders submits that the factual dispute question concerning consent to the trial strategy, which the Sixth Circuit made the basis of its decision, was never raised by Wiley until his brief in the Sixth Circuit. Therefore, Sowders should not be penalized for opposing an evidentiary hearing in the District Court, where the legal arguments raised by the Respondent were different than the ones raised by him for the first time in the Sixth Circuit. It is only

because of the fact that the Sixth Circuit made a factual finding as the basis of its opinion, that there was no consent by the Respondent to the trial strategy, that Petitioner is now presenting the argument that the Sixth Circuit should not have resolved the case without an evidentiary hearing.

Ninth, Respondent states that: "Sowders claims there is no evidence in the record to support the conclusion of the Sixth Circuit that Wiley did not consent to the two admissions of guilt by the two different lawyers" (BO 17). The Respondent further states that "there is no evidence to contradict the sworn assertions by the Wileys that they did not consent" (BO 28). Both statements are absolutely true because the factual dispute concerning consent was never argued as the most important factor by the Respondent's attorney until he reached the Sixth Circuit. This further demonstrates the need for an evidentiary hearing to resolve the consent issue.

Tenth, Respondent argues that the record is uncontradicted that counsel admitted his guilt during both portions of the trial without his consent (BO 22). Once again, there is no evidentiary record in this case either for or against Respondent on this point. The Sixth Circuit made a factual determination on this point without any evidence in the case other than unsubstantiated allegations. Again, the need for an evidentiary hearing on this point is manifest to an equitable determination of the issues.

Eleventh, Respondent argues about the apparent tactical inconsistency employed during the persistent

felony offender closing argument (BO 25). The Petitioner submits the argument about the counsel's confession of guilt in the persistent felony offender phase of trial was never raised by Respondent until he reached the Sixth Circuit.

Twelfth, Respondent correctly states that an attorney does not have the power to enter a plea which is contrary to the client's expressed plea in open court (BO 29). However, that is not the situation facing this Court in the case at bar. Trial counsel did not enter a guilty plea. It was only after the Respondent had challenged the evidence offered by the Commonwealth and presented his own evidence and had been accorded all the other rudiments of a fair trial by jury, that trial counsel employed a reasonable and competent trial tactic of conceding guilt to gain leniency for his client. This is a reasonable trial tactic since under Kentucky law, pursuant to RCr 9.84, the jury decides not only the question of guilt, but also sets the penalty (Petitioner's Appendix 71).

WHEREFORE, for the reasons set forth above and for the reasons enumerated in Petitioner's Writ of Certiorari, it is in the interest of justice that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

MICHAEL R. BEITING
Assistant Attorney General

PAUL E. REILENDER, JR.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4058
Counsel for Petitioner

PROOF OF SERVICE

I, Michael R. Beiting, one of counsel for the petitioner, hereby certify that three copies of the foregoing Reply Brief for Petitioner were mailed postage prepaid this 16th day of October, 1981, to Hon. Kevin Michael McNally, Assistant Public Advocate, State Office Building Annex, Third Floor, Frankfort, Kentucky 40601, Counsel for Earl Wayne Wiley.

Michael R. Beiting
by: Paul E Rakender Jr

MICHAEL R. BEITING
Assistant Attorney General
Counsel of Record for Petitioner